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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1932

CERTIORARI GRANTED MARCH 28, 1932

(36,550)

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

I. Rude, Plaintiff,

vs.

Joseph Buchhalter, The First National Bank of Denver, a Banking Corporation, and G. Dexter Blount, Harry Silverstein, David Rosner, Copartners, Doing Business as Blount, Silverstein & Rosner, Defendants

Bill in Equity—Filed March 26, 1930

Comes now plaintiff, I. Rude, by his attorneys, Grant, Ellis, Shafroth & Toll, and for his cause of action herein complains and alleges:

I

That he now is and at all times mentioned herein was a citizen and resident of the State of Texas;

That defendant, Joseph Buchhalter, was at all times mentioned herein, and now is a citizen and resident of the State of Colorado;

That defendant The First National Bank of Denver is a banking corporation organized under the laws of the United States of America, and is a citizen and resident of the State of Colorado and engaged in business solely in the State of Colorado;

That defendants, G. Dexter Blount, Harry S. Silverstein [fol. 2] and David Rosner, Copartners doing business as Blount, Silverstein and Rosner, were each of them at all times mentioned herein, and now are citizens and residents of the State of Colorado;

That the amount in controversy herein, exclusive of interest and costs, is in excess of the sum and value of Three Thousand Dollars ($3000.00).

II

On or about August 29, 1929, plaintiff transferred, deeded and conveyed to defendant, Joseph Buchhalter, his undivided one-quarter (¼) interest in and to the property described in the trust deed, copy of which is attached hereto and marked Exhibit A. Thereupon, and on account of said transfer said Buchhalter made, executed and delivered to said Rude his promissory note for Sixty-seven Thousand Five Hundred Dollars ($67,500) secured by trust deed on said property. Said note and trust deed were dated August 29, 1929, due in six months and called for interest at the rate of eight per cent (8%) per annum, and were made, executed and delivered to said Rude by said Buchhalter. Copy of said trust deed is attached hereto and marked Exhibit A, as hereinbefore set forth. Said Buchhalter further agreed to pay to said Rude one-half (½) of the profits realized by him on the sale of his holdings in said property, including both the one-quarter (¼) interest obtained from Rude and a one-quarter (¼) interest which he theretofore owned. The additional amount, however, to be paid to Rude on account of said profits was not to exceed the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

III

Early in October, 1929, defendant Buchhalter negotiated a sale of all his interest in said property, including both the one-quarter (¼) interest conveyed to him by Rude and a one-quarter (¼) interest which he had acquired elsewhere, to one Morris Binstock. In order to consummate the sale it became necessary for said Buchhalter to obtain a release of Rude's trust deed hereinbefore described.

Plaintiff Rude on or about the first day of November, 1929, caused said note signed by said Buchhalter and secured by said trust deed to be deposited in escrow in The First National Bank of Denver. Said note was deposited [fol. 3] on the agreement and instructions to the bank that it would be turned over to the purchaser from Buchhalter for cancellation and release of the trust deed securing the same upon the payment to the said bank of all the proceeds of said sale, to be held by said bank in trust until the said defendant Joseph Buchhalter and said plaintiff I. Rude had agreed in writing as to the disposition of said proceeds.

IV

In pursuance of said agreement said note was surrendered by said defendant bank for cancellation and said trust deed was released on or about the 15th day of November, 1929, and there was paid into the bank, to be held by it under and in accordance with said escrow agreement, the sum of Twenty-eight Thousand Eighty Dollars and Fifty Cents ($28,080.50) in cash together with six per cent (6%) first mortgage bonds of The Colorado Paper Products Company, dated November 1, 1929, of the face value of Ninety-two Thousand Five Hundred Dollars.

V

On or about the 18th day of November, 1929, plaintiff I. Rude and defendant Joseph Buchhalter entered into an oral agreement at The First National Bank of Denver whereby it was agreed that said I. Rude would be paid at once by said Joseph Buchhalter the full amount of his note and accrued interest in cash in the sum of Sixty-seven Thousand Five Hundred Dollars ($67,500.00) plus accrued interest, together with Seven Thousand Five Hundred Dollars ($7,500.00) which Buchhalter had agreed to pay at the time of the conveyance of the property hereinbefore described, plus interest at the rate of eight per cent (8%) per annum from the date of said sale to Binstock. It was further mutually agreed between said Rude and Buchhalter that the bonds in the sum of Ninety-two Thousand Five Hundred Dollars ($92,500.00) on deposit with The First National Bank of Denver, under said escrow agreement should be held as collateral to secure said payment to said Rude and should be left in the escrow with the bank until said cash was paid to said Rude, at which time said bonds were to be delivered to said Buchhalter. It was further agreed that of the Twenty-eight Thousand, Eighty Dollars and Fifty-six Cents ($28,080.56) held in escrow by the bank, Sixteen Thousand Three Hundred Sixty-five Dollars and Thirty-four Cents ($16,365.34) should be paid immediately [fol. 4] to said Rude and Eleven Thousand Six Hundred Fifteen Dollars and Twenty-two Cents ($11,615.22) should be paid to said Buchhalter to enable him to pay the said bank the principal and interest of a note owing by said Buchhalter to said bank, and so to obtain a release of certain

collateral of said Buchhalter held by the bank as security for the Buchhalter note. It was further agreed that said Buchhalter would immediately sell said collateral and pay the said Rude the balance due him of Fifty-nine Thousand Six Hundred Ninety-nine Dollars and Sixty-one Cents ($59,699.61).

In pursuance of said agreement said Buchhalter and said Rude directed the said bank to pay, and said bank did on November 18, 1929, pay from said escrow holdings to said Rude the sum of Sixteen Thousand Three Hundred Sixty-five Dollars and Thirty-four Cents ($16,365.34), and to said Buchhalter the sum of Eleven Thousand Six Hundred Fifteen Dollars and Twenty-two Cents ($11,615.22) which said Buchhalter paid to said bank and said bank delivered to said Buchhalter the said collateral securing his note.

That there remained and remains due and unpaid from said Buchhalter to said Rude the sum of Fifty-nine Thousand Six Hundred Ninety-nine Dollars and Sixty-one Cents ($59,699.61). Neither said sum nor any part thereof has been paid to said plaintiff though he has repeatedly demanded payment.

VI

Plaintiff says that defendant The First National Bank of Denver is now holding first mortgage bonds of The Colorado Paper Products Company in the sum of Ninety Thousand Dollars ($90,000.00) and cash in the sum of Twenty-five Hundred and Thirteen Dollars and Seventy-two Cents ($2,513.72) in said escrow.

By reason of the facts herein set forth plaintiff is entitled to an equitable lien on said assets to secure the payment in full of said sum due from Buchhalter and by the terms of said agreement hereinbefore set forth the said assets are pledged and bound as collateral to secure to plaintiff the payment of Fifty-nine Thousand Six Hundred Ninety-nine Dollars and Sixty-one Cents ($59,699.61). Defendant Buchhalter has failed, neglected, and refused to make said payment as agreed. Plaintiff has no adequate remedy at law. [fol. 5] Said defendant bank claims a lien on said bonds and cash held in escrow to secure to it the payment of a loan to said Buchhalter in the sum of One Thousand Two Hundred Fifty Dollars ($1,250.00) made by said bank subsequent to November 18, 1929, and subsequent to the agree-

ment hereinbefore set forth and with full knowledge of said escrow and said agreement and without the knowledge or consent of said Rude. Said lien and all rights of said bank are in truth and in fact subject and secondary to the first and prior lien of said plaintiff, but said bank refuses to recognize said prior rights of said plaintiff and is claiming and asserting priority for its lien.

The escrow agreement under which said bank received said bonds and cash provides that the same shall be held by it until such time as I. Rude and Joseph Buchhalter have agreed in writing concerning the disposition thereof. Plaintiff alleges that they have not agreed in writing and that it is impossible to obtain an agreement in writing concerning the disposition of said cash and bonds, that defendant bank refuses to recognize the lien of plaintiff and refuses to sell said bonds for the purpose of satisfying said lien, and refuses to deliver said bonds or cash to plaintiff without the written agreement of Josephine Buchhalter, which it is impossible to obtain.

VII

Defendants G. Dexter Blount, Harry S. Silverstein and David Rosner, Co-Partners doing business as Blount, Silverstein & Rosner have heretofore, and on or about the eleventh day of March, 1930, issued a garnishment against the said defendant bank, attaching the interest of Joseph Buchhalter as well as the interest of I. Rude, and said defendants claim a lien on said interest of Joseph Buchhalter prior to the lien of plaintiff. Plaintiff alleges that said attachment and garnishment was made long after November 18, 1929, and with full knowledge by said defendants and each of them of the rights of plaintiffs and of all the matters set forth in this bill. Plaintiff says that in truth and in fact the lien created by said attachment and garnishment is secondary and subject to both the lien of the plaintiff and of the bank.

Wherefore plaintiff prays that his said lien be adjudged and declared a first and prior lien on all assets held in said escrow and that said bonds hereinbefore described, held in [fol. 6] escrow by said defendant bank, be sold to satisfy said lien and that said bank be directed to pay over to said plaintiff all cash held by it in said escrow and the proceeds

realized from the sale of said bonds not in excess of Fifty-nine Thousand Six Hundred Ninety-nine Dollars and Sixty-one Cents ($59,699.61) and accrued interest from November 18, 1929, at the rate of eight per cent (8%) per annum; and for judgment against defendant Buchhalter in the sum of Fifty-nine Thousand Six Hundred Ninety-nine Dollars and Sixty-one Cents ($59,699.61), together with interest at the rate of eight per cent (8%) per annum from November 18, 1929, and that all sums paid to said plaintiff from said escrow, both in cash now on hand, and the proceeds of the sale of said bonds be credited on said judgment; and for such other and further relief as to the Court may seem just.

Grant, Ellis, Shafroth & Toll, W. W. Grant, Jr., Morrison Shafroth.

Duly sworn to by Morrison Shafroth. Jurat omitted in printing.

EXHIBIT A TO BILL OF COMPLAINT

Book 180, Page 532. Recorded Aug. 30, 1929, at 11:29 o'clock A. M. Reception No. 153,134. Fred O. Pearce, Recorder.

No. 840 Deed of Trust—Public Trustee—Receiver's Clause—Attorney's Fees.

[fol. 7] This Indenture, Made this twenty-ninth day of August in the year of our Lord one thousand nine hundred and twenty-nine between Joseph Buchhalter, whose address is 765 York Street, City and County of Denver and State of Colorado, party of the first part, and the Public Trustee of the County of Adams in the State of Colorado, party of the second part Witnesseth:

That Whereas, The said Joseph Buchhalter has executed his promissory note bearing even date herewith for the principal sum of Sixty-seven Thousand Five Hundred and no /100 ($67,500.00) Dollars, payable to the order of I. Rude six (6) months after the date thereof, with interest thereon from the date thereof at the rate of eight (8) per cent, per annum, payable at maturity.

And, Whereas, the said party of the first part is desirous of securing the payment of the principal and interest of said promissory note in whose hands soever the said note or any of them may be.

Now, therefore, the said party of the first part, in consideration of the premises, and for the purpose aforesaid, does hereby grant, bargain, sell and convey unto the said party of the second part, in trust, forever, the following described lots or parcels of land, namely:

An undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Gilpin, State of Colorado, to-wit: The North One-half (N. ½) of Section Thirty-six (36), Township One (1) South of Range Seventy-four (74) West of the Sixth Principal Meridian; the Walter A. Placer Mining Claim, and the following lode mining claims: Argo, Snowball, Nos. One (1) and two (2), Mystery Scranton Nos. One (1), Two (2), Three (3), and Four (4), Caroline M. Little Tootsey, Flying Jib and Reward, said mining claims being situated in Sections Twenty-six (26) and Thirty-five (35), Township One (1) South of Range Seventy-four (74), West of the Sixth Principal Meridian, In Gilpin County, Colorado;

Also an undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Adams, State of Colorado, to-wit; The West One-half (W. ½) of the South-east quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of Section Twelve (12) in [fol. 8] Township Three (3), South Range Sixty-eight (68) West of the Sixth Principal Meridian, except a strip of land one hundred (100) feet in width, and six hundred sixty (660) feet, more or less in length across the entire north end of the said West one-half (W. ½) of the Southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of said Section Twelve (12) being the north one hundred (100) feet of said tract of land; also except all rights of way now occupied for railroads and railroad purposes; and also except rights of way and easements now occupied for ditches and ditch rights, if any there be, together with an undivided one-fourth (¼) interest in and to all improvements, buildings, machinery, equipment, tools, supplies, office furniture and fixtures, situated thereon or on any of the above described real estate hereby conveyed, together with an undivided one-fourth (¼) interest in and to the good will of Colorado Pulp and Paper Company, and an undivided one-fourth (¼) interest in and to the waste paper contracts of said Colorado Pulp and Paper Company, and of all of its right, title and interest therein, and of the Receiver

of said Company therein, insofar as the rights of said company, or Receiver therein, may be or are assignable; intending to hereby convey and conveying hereby an undivided one-fourth (¼) interest in and to all and singular the same property conveyed by that certain Special Master's Deed dated August 14th, 1929, from George W. Beck, as Special Master, as grantor, to I. Rude, and Max Bronstein, as grantees, and which said Special Master's Deed was recorded August 15th, 1929, in Book 180 at page 251, of the records in the office of the County Clerk and Recorder of Adams County, Colorado.

To Have and to Hold the same, together with all and singular the privileges and appurtenances, thereunto belonging: In Trust Nevertheless, that in case of default in the payment of said note or any of them, or any part thereof, or in the payment of the interest thereon, according to the tenor and effect of said note or any of them, or in the payment of any prior incumbrance, principal or interest, if any, or in case default shall be made or in case of violation or breach of any of the terms, conditions, covenants or agreements herein contained, then, upon notice and demand in writing filed with the said party of the second part by the beneficiary hereunder or the legal holder of the indebtedness secured hereby, that such beneficiary or legal holder has declared a violation of any of the covenants [fol. 9] herein contained, and has elected to advertise said property for sale, and demands such sale, it shall and may be lawful for said party of the second part to sell and dispose of the same (enmasse or in separate parcels, as said Public Trustee may think best), and all the right, title and interest of said party of the first part, his heirs, or assigns, therein, at public auction at the front door of the Court House, in Brighton, County of Adams, and State of Colorado, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, four weeks' public notice having been previously given of the time and place of such sale, by advertisement, weekly, in some newspaper of general circulation at that time published in said County of Adams, a copy of which printed notice, as soon as printed, shall be mailed to said party of the first part (and all subsequent incumbrances) at the address given in the trust deed, and to make and give to the purchaser or purchasers of such

property at such sale, a certificate or certificates in writing describing such property purchased, and the sum or sums paid therefor, and the time when the purchaser or purchasers (or other person entitled thereto) shall be entitled to a deed or deeds therefor, unless the same shall be redeemed as is provided by law; and said Public Trustee shall, upon demand by the person or persons holding the said certificate or certificates of purchase, when said demand is made, or upon demand by the person entitled to a deed to and for the property purchased, at the time such demand is made, the time for redemption having expired, make and execute to such person or persons a deed or deeds to the said property purchased which said deed or deeds shall be in the ordinary form of a conveyance, and shall be signed, acknowledged and delivered by the said Public Trustee, as grantor, and shall convey and quit-claim to such person or persons entitled to such deed, as grantee, the said property purchased as aforesaid, and all the right, title, interest, benefit and equity of redemption of the party of the first part, his heirs and assigns, therein and shall recite the sum or sums for which the said property was sold and shall refer to the power of sale herein contained, and to the sale or sales made by virtue thereof; and in case of an assignment of such certificate or certificates of purchase, or in case of the redemption of such property, by a subsequent incumbrancer, such assignment or redemption [fol. 10] shall also be referred to in such deed or deeds; but the notice of sale need not be set out in such deed or deeds; and the said Public Trustee shall, out of the proceeds or avails of such sale, after first paying and retaining all fees, charges and costs of making said sale, pay to the beneficiary hereunder or the legal holder of said note the principal and interest due on said note according to the tenor and effect thereof, and all moneys advanced by such beneficiary or legal holder of said note for insurance, taxes and assessments, with interest thereon at eight per cent per annum, rendering the overplus, if any, unto the said party of the first part, his legal representatives or assigns; which sale or sales and said deed or deeds so made shall be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming the said property, or any part thereof, by, from, through or under said party of the first part or any of them. The

holder or holders of said note or notes may purchase said property or any part thereof; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money. If a release deed be required, it is agreed that the party of the first part, his heirs or assigns, will pay the expense thereof.

And the said party of the first part, for himself and for his heirs, executors and administrators, covenants and agrees to and with the said party of the second part, that at the time of the ensealing of and delivery of these presents, he is well seized of the said lands and tenements in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid; hereby fully and absolutely waiving and releasing all rights and claims he may have in or to said lands, tenements and property as a Homestead Exemption, or other exemption, under and by virtue of any act of the General Assembly of the State of Colorado now existing or which may hereafter be passed in relation thereto; and that the same are free and clear of all liens and incumbrances whatever, excepting, however, and subject to, any and all writs of error sued out, or which may be sued out, in the Supreme Court of the State of Colorado, to review any judgment or decree of sale entered in Case No. 2367 in the District Court of Adams County, Colorado, wherein Charles B. Myers is plaintiff, and Colorado Pulp [fol. 11] and Paper Company and others, are defendants. and the above bargained property in the quiet and peaceable possession of the said party of the second part, his successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will Warrant and Forever Defend.

And the said party of the first part will in due season pay all taxes and assessments levied on said property; all amounts due on account of principal and interest on prior incumbrances, if any; and, will keep all buildings that may at any time be on said lands, during the continuance of said indebtedness, insured against loss by fire in such company or companies as the holder of said note may, from time to time direct, for such sum or sums as such company or companies will insure for, not to exceed the amount of said indebtedness, except at the option of said party of the first

part, with loss, of any, payable to the beneficary hereunder, as his interest may appear, and will deliver the policy or policies of insurance to the beneficiary hereunder, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of said party of the first part to thus insure and deliver the policies of insurance, or to pay such taxes or assessments or amounts due or to become due or any prior incumbrance, if any, then the holder of said note or any of them, may procure such insurance, or pay such taxes or assessments or amounts due upon prior encumbrances, if any, and all moneys thus paid, with interest thereon at eight per cent per annum, shall become so much additional indebtedness, secured by this deed of trust, and shall be paid out of the proceeds of the sale of the property aforesaid, if not otherwise paid by said party of the first part.

And That In Case of Any Default, Whereby the right of foreclosure occurs hereunder, the said party of the second part or the holder of said note or certificate of purchase, shall at once become entitled to the possession, use and enjoyment of the property aforesaid, and to the rents, issues and profits thereof, from the accuring of such right and during the pendency of foreclosure proceedings and the period of redemption, if any there be; and such possession shall at once be delivered to the said party of the second part or the holder of said note or certificate of purchase on [fol. 12] request, and on refusal, the delivery of such possession may be enforced by the said party of the second part or the holder of said note or certificate of purchase by any appropriate civil suit or proceeding, and the said party of the second part, or the holder of said note or certificate, of purchase, or any thereof, shall be entitled to a Receiver for said property, and of the rents, issues and profits thereof, after any such default, including the time covered by foreclosure proceedings and the period of redemption, if any there be, and shall be entitled thereto as a matter of right without regard to the solvency or insolvency of the party of the first part or of the then owner of said property and without regard to the value thereof, and such Receiver may be appointed by any court of competent jurisdiction upon ex parte application, and without notice, notice being hereby expressly waived—and all rents, issues and profits, income and revenue therefrom shall be applied

by such Receiver to the payment of the indebtedness hereby secured, according to law and the orders and directions of the court.

And, That in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note aforesaid, or any of them, or any part thereof, or of a breach or violation of any of the covenants or agreements herein, by the party of the first part, his executors, administrators or assigns, then and in that case the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said property be sold in the manner and with the same effect as if the said indebtedness had matured, and that if foreclosure be made by the Public Trustee and attorney's fee of the sum of — dollars for services in the supervision of said foreclosure proceedings shall be allowed by the Public Trustee as a part of the cost of foreclosure, and if foreclosure be made through the courts a reasonable attorney's fee shall be taxed by the court as a part of the costs of such foreclosure proceedings.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) Joseph Buchhalter. (Seal.)

[fol. 13] State of Colorado,
City & County of Denver, ss:

I, Marie B. Reed, a Notary Public in and for said City & County of Denver, in the State aforesaid, do hereby certify that Joseph Buchhalter who is personally known to me to be the person whose name is subscribed to the foregoing Deed of Trust, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein specified.

Given under my hand and notarial seal this 29th day of August, A. D., 1929. My notarial commission expires August 30th, 1931.

(Signed) Marie B. Reed, Notary Public. (Seal.)

STATE OF COLORADO,
County of Adams, ss:

I, Fred O. Pearce, County Clerk and Recorder in and for said County of Adams, State of Colorado, do hereby certify that the foregoing is a full, true and correct copy of Trust Deed as the same appears upon the records of my office. Book 180, Page 532 Reception No. 153134.

Given under my hand and official seal this tenth day of February, A. D. 1930, at 10:30 A. M.

(Signed) Fred O. Pearce, County Clerk and Recorder. (Seal.)

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT JOSEPH BUCHHALTER—Filed April 12, 1930.

Comes now Joseph Buchhalter, one of the defendants above named, by his attorney, and for his separate answer to the Bill herein avers and alleges:

I

That he admits that the plaintiff chiefly resides in the State of Texas but as to whether the said plaintiff is a citizen of said State this defendant is without knowledge.

Admits that this defendant was at all times in the said bill of complaint mentioned and now is a citizen and resident of the State of Colorado.

Admits the amount herein in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars.

[fol. 14] II

Admits the allegations of paragraph II of said bill to the effect that on or about August 29th, 1929, the plaintiff Rude transferred and conveyed to this defendant the property mentioned in Paragraph II of said bill, but in this behalf avers and alleges said plaintiff and this defendant were then and there and long prior thereto had been jointly and equally interested in said mentioned property and further avers the said alleged transfer and conveyance of said in-

terest by said plaintiff to this defendant was solely and only made, done and brought about so that, and in order to, consolidate said interest in this defendant to enable him to more readibly and expeditiously to sell and dispose thereof for the joint account and equal benefit, interest and behoof of both said plaintiff and this defendant. That said conveyance to this defendant by said plaintiff was in the interest of convenience and was intended by both of said parties to vest only in this defendant the naked, legal title to said properties so that this defendant might and should be the conduit of further transfer in the event of sale of same to a third person or third persons of said interests; that said plaintiff was then and there and at the time of said negotiations for the attempted sale of said properties, about to be absent from the City of Denver and State of Colorado and thereafter continued to be absent much of the time.

This defendant denies as alleged in said paragraph II that "Thereupon and on account of said transfer said Buchhalter made, executed and delivered to said Rude his promissory note for Sixty-seven Thousand, Five Hundred ($67,500.00) Dollars secured by trust deed on said property," and in this behalf alleges that while such purported note, purported to be secured as aforesaid, was by this defendant executed and delivered to said plaintiff, same was not on account of said alleged transfer by the plaintiff to this defendant but upon the contrary such purported note and purported trust deed had no relation of any sort or nature to said transfer and in this behalf this defendant avers and alleges the facts to be as follows, and not otherwise, to-wit:

That after said transfer aforesaid by said plaintiff to this defendant, said plaintiff did represent and state to this defendant that he, said plaintiff, conceived it to be of prospective or potential advantage to the interests of both [fol. 15] said plaintiff and this defendant if an encumbrance would be or were to be placed upon said joint interests so then and there had, held and owned by them (notwithstanding the alleged and purported conveyance to this defendant by said plaintiff as aforesaid) inasmuch as that the remaining one-half interest in said premises was then and there and long prior thereto had been owned and held by one Max Bronstine and certain of his associates who

were then and there and who had long prior thereto been inamicable and antagonistic to both said plaintiff and this defendant, such and said prospective or potential advantage to consist as said plaintiff then and there represented to this defendant in expediting a purchase by said Bronstine and associates of the interests of said plaintiff and this defendant, or, that failing which, should litigation between said Bronstine and associates and this defendant and said plaintiff ensue, that possible advantage would accrue to both said plaintiff and this defendant if such and said encumbrance upon said interests were to be and appear of record. And in this behalf this defendant avers that he did not approve of the giving or execution of said note and said trust deed for said or any of said proposed purposes but that he, this defendant, did then and there and long prior thereto had reposed absolute confidence not only in the fidelity and integrity, but also in the business acumen of said plaintiff and so reposing such confidence in said plaintiff (all of which said plaintiff then and there well knew) did permit himself, this defendant, to be persuaded by said plaintiff to execute and deliver unto said plaintiff said mentioned promissory note and deed of trust, but solely and only upon the express and distinct understanding and agreement then and there made and had, by and between said plaintiff and this defendant, that said note and deed of trust did not represent any indebtedness of any sort or nature owing to said plaintiff by this defendant; and that the same was not intended to represent any indebtedness or other obligation; that same was wholly without any consideration whatsoever; that as between plaintiff and this defendant, said note and said deed of trust was wholly fictitious and represented nothing; and upon and only upon such and said express condition that said plaintiff would never seek or attempt to negotiate the same, and would never seek or attempt to enforce said note, or said deed of trust as against this defendant or any other person, did [fol. 16] this defendant deliver the same to said plaintiff; and said plaintiff then and there and as a further condition of delivery of said note and said trust deed to said plaintiff by this defendant, did further agree to and with this defendant that so soon as such and said note or trust deed might have answered the proposed purpose or purposes of their execution, that same should be cancelled and destroyed, or

should same develop to be uneffectual for said proposed purposes, that then also should same be cancelled and destroyed.

Further answering said paragraph II of said bill this defendant denies that he ever agreed with said plaintiff to pay said plaintiff one-half or any other proportion or percentage of profits and denies that the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, or any other sum, was by this defendant agreed to be paid to said plaintiff either as profits or on any other account or at all. And in this behalf further alleges that there were never at any time nor have there been nor are there now, any profits accruing to either this defendant or said plaintiff in connection with any matter or thing in said bill alleged.

And this defendant further avers that said plaintiff and this defendant were and long had been, approximately equally financially interested in said properties in said bill of complaint mentioned; that the sole and only agreement of said plaintiff and this defendant in connection therewith was and is that upon a sale or disposition of said property, and which sale and disposition it was at all times agreed by and between said plaintiff and this defendant should be joint and entire, that then said plaintiff and this defendant would equally share in whatever might be the proceeds of such disposition. That as hereinbefore alleged, said transfer to this defendant by said plaintiff was solely and only in order to facilitate and expedite such disposition, but that none the less, the equitable interests and rights of the parties remained, were and are precisely as they had been prior to said transfer, to-wit, a one-fourth interest each in and to said mentioned properties, or in lieu thereof, an equal interest in their proceeds.

III

For answer to paragraph III of said bill this defendant admits said mentioned properties were sold to one Binstock and associates but in this behalf alleges that such and said [fol. 17] sale was negotiated and consummated on behalf of said plaintiff as well as on behalf of this defendant and not otherwise, and that same was with the full approval, sanction and consent of said plaintiff who, in order to enable this defendant to complete said sale and disposition, did sur-

render to the First National Bank of Denver said note and trust deed for cancellation and release. The said note and said deed of trust then and there and long prior thereto having been found by said plaintiff Rude to have answered or served none of the proposed purposes for which he had theretofore solicited their making and execution. This defendant admits that said The First National Bank of Denver was directed to retain the proceeds of said bill subject to the written directions of said plaintiff and this defendant, and in this behalf avers that such was to enable the parties to check up their respective investments in said properties and definitely ascertain their respective interests in said proceeds, subject to possible minor accountings between them.

IV

For answer unto paragraph IV of said bill, this defendant admits that said note was cancelled and said deed of trust released on or about November 15th, 1929, but denies the same was pursuant to any agreement other than as is in this answer alleged. Admits the sum of Twenty-Eight Thousand Eighty and 50/100 ($28,080.50) Dollars in cash together with the bonds mentioned, were deposited in The First National Bank of Denver save that this defendant denies that said funds and said bonds were to be held by said bank for any reason or purpose or otherwise than in this answer set forth.

V

For answer unto paragraph V of the said bill, this defendant denies all and singular the alleged oral agreement therein set forth; denies that he, this defendant, ever agreed to pay said plaintiff said note of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars or any part thereof and in this behalf again avers that said note was delivered by this defendant to said plaintiff upon the sole condition that he, the said plaintiff, would never seek or attempt to enforce the same or any part thereof as against either this defendant or any other person; denies that he, this defendant, ever promised or agreed to pay to said plaintiff the sum of [fol. 18] Seven Thousand Five Hundred ($7,500.00) Dollars either at the time of said plaintiff's alleged transfer to this

defendant or at any other time, or at all, and in this behalf asserts that at the time of such alleged transfer said plaintiff requested that such and said sum be made to appear as a part consideration so that same could be exhibited to said Bronstine and associates and that said Bronstine and associates would conclude said transaction was real, as distinguished from fictitious and colorable, or as a matter of mere convenience, and this defendant having then and there the confidence as aforesaid in the fidelity, good faith and integrity of said plaintiff, did at said plaintiff's instance, as aforesaid, permit the recital of the sum of Seven Thousand Five Hundred ($7,500.00) Dollars as part consideration for said alleged transfer, it being then and there and at all times distinctly understood and agreed as between said plaintiff and this defendant that the whole transaction was one of convenience only and in order to facilitate and expedite a disposition of said interests in behalf of both said plaintiff and said defendant.

This defendant denies that said bonds, or any thereof, were agreed by this defendant to be allowed to remain with said The First National Bank of Denver as collateral to secure any payment to said plaintiff; denies that this defendant ever promised or agreed to make any payment whatsoever to said plaintiff and denies all and singular the allegations of paragraph V of said bill in this behalf.

With reference to the alleged payment of Twenty-Eight Thousand Eighty and 56/100 ($28,080.56) Dollars to said The First National Bank of Denver, this defendant admits that same was disbursed by said bank as he alleged, but in this behalf further states that the reason why said plaintiff was paid approximately Five Thousand ($5,000.00) Dollars more of said funds than was this defendant, was only and solely in order to enable said plaintiff to apply said amount to attorney's fees then due and owing by both this plaintiff and said defendant to the firm of Blount, Silverstein and Rosner, a law firm of City and County of Denver and State of Colorado, and for the payment of which said attorney's fees both said plaintiff and this defendant were and are equally and jointly responsible and that said sum of Five Thousand ($5,000.00) Dollars was by said plaintiff immedi-
[fol. 19] ately thereafter so paid and applied to the account of said firm.

This defendant admits that he applied a portion of the sum by him individually received from said The First National Bank, to the payment of certain indebtedness then and there and by him to The First National Bank owed, but he denies that he ever agreed with said plaintiff or with any other person whomsoever to sell or dispose of any collateral then and there or at any time by him owned for the purpose of paying said plaintiff the sum of Fifty-Nine Thousand Six Hundred Ninety-Nine and 61/100 ($59,699.61) Dollars or any other sum whatsoever or at all and in this behalf further alleges that the collateral then and there released to this defendant by said bank amounted to only about Six Thousand ($6,000.00) Dollars in value, all of which said plaintiff then and there well knew.

This defendant admits the respective payments by said bank to said plaintiff and this defendant as alleged in said paragraph V, save that he denies that same was pursuant to any agreement other than that herein alleged and set forth.

This defendant denies that there remains due and unpaid from this defendant to said plaintiff the sum of Fifty-nine Thousand Six Hundred Ninety-Nine and 61/100 ($59,-699.61) Dollars or any other sum whatsoever; denies that he ever agreed to pay said plaintiff said sum, or any other sum or amount whatsoever, and this defendant again avers the only agreement ever had by and between said plaintiff and this defendant respecting any matter or thing in said bill of complaint alleged was to share and share alike in whatever might represent the proceeds of the sale of their joint and equal interests in and to the properties in said bill of complaint mentioned.

VI

For answer to paragraph VI of said bill this defendant admits that said The First National Bank of Denver now holds the funds and securities to the amounts alleged, but denies that same are held by said bank pursuant to any escrow other than that in this answer set forth; denies that said plaintiff has, or possesses, or ever had or possessed, or is now, or ever was entitled to any lien, equitable or otherwise, as against said funds and securities to secure the pay-[fol. 20] ment of any sum whatsoever from this defendant to said plaintiff; denies that any sum whatsoever is due or

owing from this defendant to said plaintiff and denies that the lien of said bank or the lien of any other person or persons whomsoever is second to the pretended lien of said plaintiff; denies that said plaintiff has or ever had any lien of any sort or nature upon or against said funds or bonds or any thereof.

This defendant admits that said The First National Bank was by said plaintiff and this defendant instructed to distribute said bonds and said funds only as this defendant and said plaintiff might in writing jointly direct and admits that said parties have been unable to agree in that behalf, but with respect thereto further alleges, that said inability to agree has been and now is, solely due to the acts and conduct of said plaintiff, in that said plaintiff, after the consummation and sale of the interests of said plaintiff and this defendant as aforesaid, fraudulently, wickedly and nefariously conceived the idea, notion and intent to seek to force and coerce this defendant to give him, the said plaintiff, a vastly larger share and proportion of the proceeds of said sale than he, the said plaintiff, was or would be under any contract or agreement theretofore had with this defendant entitled, and to such end sought to employ and utilize said fictitious note and deed of trust so conditionally delivered by this defendant to said plaintiff as aforesaid, as an instrument of alleged verity and validity; the said plaintiff sometimes in this behalf, asserting that he would not seek to enforce said pretended and fictitious note if he, this defendant, would permit him, the said plaintiff, to receive all of the cash realized from the said sale of said interests and sometimes asserting that unless this defendant would pay and give him, said plaintiff, a large bonus, that he, said plaintiff, would undertake or attempt to enforce as against this defendant said pretended and fictitious note and deed of trust.

For further answer this defendant alleges that he was at all times willing said plaintiff should receive his accurate and proper amount and share of said aggregate sums and bonds, which said plaintiff at all times refused to receive or accept and was at all times willing to so instruct The First National Bank in writing, but solely on account of the wrongful and fraudulent demands and conduct of said plain-
[fol. 21] tiff, as aforesaid, has this defendant refused to render or give written or any instructions to said bank.

VII

For answer to so much of paragraph VII of said bill as this defendant is advised that it is necessary or proper for him to answer, he denies that said plaintiff has or possesses or ever had or possessed, any lien whatsoever on said bonds and funds or any thereof for or on account of any matter or thing in said bill alleged, or for or on account of any matter or thing or at all.

VIII

And for further answer unto said bill, this defendant avers and alleges that said plaintiff is not in this Honorable Court with clean hands; that his entire alleged and pretended cause of action is wrongful and fraudulent; said plaintiff is in effect seeking to enforce as against this defendant the alleged and pretended note in the sum of Sixty Seven Thousand Five Hundred ($67,500.00) Dollars so delivered as aforesaid by this defendant to said plaintiff upon the sole and express condition accepted and agreed to by said plaintiff as aforesaid, that same was fictitious and as between said plaintiff and this defendant, void.

That said plaintiff now well knows and at all times in his said bill of complaint mentioned and long prior thereto well knew all and singular the matters in this answer set forth, but none the less and with fraudulent and wicked purpose to vex, harass and annoy this defendant and likewise in order to seek to impose a personal liability upon this defendant in lieu and instead of his proper share of said proceeds of said sale of said joint interests, is seeking by and through the writs, processes and decrees of this Honorable Court, to perpetrate a fraud upon this defendant and upon the several other defendants herein named and upon this Honorable Court.

This defendant further alleges and avers that in equity and good conscience said bill of complaint should be dismissed upon the merits.

Wherefore this defendant prays that the prayer of said bill of complaint be in all things denied; that said bill be declared and held to be unconscionable and inequitable; that [fol. 22] same be dismissed upon the merits; for costs and

for all such other and further relief as in equity and good conscience the facts warrant.

Henry E. Lutz, Attorney for Defendant Joseph Buchhalter.

Duly sworn to by Joseph Buchhalter. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF G. DEXTER BLOUNT, HARRY SILVERSTEIN, DAVID ROSNER, COPARTNERS, DOING BUSINESS AS BLOUNT, SILVERSTEIN & ROSNER—Filed April 14, 1930

Come now G. Dexter Blount, Harry S. Silverstein and David Rosner, three of the defendants above named, and for their separate answer to the bill herein, or to so much thereof as they are advised it is necessary or proper for them to answer unto, aver and allege:

I

Admit that plaintiff resides chiefly in the State of Texas, but as to whether or not he is a citi-en of said state these defendants are without knowledge.

Admits that defendant, Buchhalter, is a citizen and resident of Colorado; that defendant, The First National Bank of Denver, is a banking corporation, and a citizen and resident of Colorado; that the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, and that these defendants, and each of them, are now and at all times in said bill mentioned were citizens and residents of the State of Colorado, and Co-partners as therein alleged.

[fol. 23] II

Admit the conveyance by plaintiff to defendant, Buchhalter of the property mentioned in Paragraph II of said bill, and the execution of the note and deed of trust therein mentioned on or about August 29th, 1929, but as to any agreement on the part of said defendant, Buchhalter, or any further agreement upon his part, to pay to said plaintiff either one-half of any profits arising out of anything what-

soever, or of any additional amount or any payments whatsoever, these defendants are without knowledge.

And in this behalf, these defendants are informed and believe and so allege that said plaintiff and said Rude were then and prior thereto jointly interested in said property in Paragraph II of said bill described; that said conveyance and said note and deed of trust were made solely in the interest of convenience, and for the purpose of vesting in defendant, Buchhalter, only the naked legal title to said properties in order to facilitate the sale and transfer of same to some third person or persons of their said joint interests; that said note and deed of trust were delivered by said defendant, Buchhalter, to said plaintiff only conditionally and solely upon the condition, and with the express and distinct understanding and agreement then and there made and had between said plaintiff and said defendant, Buchhalter, and that there was no indebtedness of any kind whatsoever, represented by said note or deed of trust as between the said defendant, Buchhalter, and said plaintiff, and was wholly without consideration, and upon the further express condition and understanding then and there made and had between them that said plaintiff would never permit said note or deed of trust to pass out of his possession to any third person, and would never seek to enforce or attempt to enforce said note or deed of trust as against said defendant, Buchhalter, and that in the event of a sale of said property, and of the interests of said plaintiff, and said defendant, Buchhalter, therein, said note and deed of trust should be cancelled and discharged of record, and that said plaintiff and said defendant, Buchhalter, were still and nevertheless to be and were jointly interested in said properties and in the sale thereof.

III

Admit said described properties were sold to one Binstock and associates, but that said sale was the sale of the [fol. 24] interests of both plaintiff and defendant, Buchhalter, in said properties.

Admit the cancellation and release of said note and deed of trust, and deposit of same with The First National Bank of Denver, and that said bank was directed to retain the proceeds subject to the written directions of plaintiff and defendant as to the disposition thereof, as between them, as

the result of the sale of their joint interests in said properties.

IV

Answering Paragraph IV of said bill, admit the cancellation of said note and the release of said deed of trust, but upon information deny that same was in pursuance of the agreement in said bill alleged or any agreement other than the agreement to facilitate the conveyance of said property, and to cancel and release same upon such sale. Admit the payment into the bank of the sum of Twenty-Eight Thousand Eighty and 50/100 ($28,080.50) Dollars in cash, together with the bonds as in Paragraph IV mentioned.

V

In answer to Paragraph V of said bill these defendants are wholly without knowledge as to the, or any of the, alleged oral agreements therein mentioned between plaintiff and defendant, Buchhalter, and are also without knowledge as to the payment by said bank or out of any moneys on deposit with them of any amounts whatsoever to any one, and are without knowledge as to whether any amount whatsoever is or remains due to or from said defendant, Buchhalter, or to said plaintiff.

VI

And answering Paragraph VI of said bill these defendants admit that said bank now holds the bonds and cash in the sums and amounts alleged, but as to whether they are held on any escrow or under any other understanding or agreement, except to await the proper division of the respective interests of said plaintiff and said defendant, Buchhalter, in the proceeds of the said sale in proportion to their respective interests in said properties, these defendants are without knowledge.

But these defendants specifically deny that plaintiff is [fol. 25] entitled to, or has or possesses or ever had or possessed any lien, equitable or otherwise, upon or against any of the funds or bonds on deposit in The First National Bank of Denver as set forth in Paragraph VI of said bill, or otherwise.

As to whether defendant, Buchhalter, has failed to make any payment whatsoever to plaintiff, and as to whether de-

fendant bank claims a lien on said bonds and cash, or any of them, these defendants are without knowledge.

VII

These defendants admit that on or about the 11th day of March, 1930, they caused a garnishment process to be issued against said The First National Bank with respect to the bonds and funds in said complaint mentioned, but they deny that these defendants, or either of them, ever had any knowledge of any sort or nature that the said plaintiff has, or possesses, or ever had or possessed, any lien whatsoever upon or against said funds or said bonds, and further deny that the said plaintiff has now, or is entitled to or ever had or possessed any such lien, equitable or otherwise, upon or against said funds or said bonds.

VIII

For further answer to said bill, these defendants and each of them, deny that they, or either of them, have or ever had, full or any knowledge of the rights of said plaintiff as set forth in his said bill, but upon the contrary allege that he, the said plaintiff, is now and at all times in said bill mentioned, has been wholly without the, or any, rights, attempted to be alleged therein.

IX

That otherwise than as herein admitted, or otherwise alleged, these defendants and each of them, deny all and singular the allegations of said bill in the manner and form as they are therein alleged.

Wherefore these defendants pray that the alleged and pretended relief sought by said plaintiff as against these defendants in said bill be in all things denied; that they have their proper costs in this behalf expended; that they go [fol. 26] hence without day; and that they have all and such further relief as the facts warrant.

Henry E. Lutz, Attorney for Defendants G. Dexter Blount, Harry Silverstein, and David Rosner.

Duly sworn to by Harry S. Silverstein. Jurat omitted in printing.

In United States District Court

Separate Answer of First National Bank of Denver—Filed April 16, 1930

Comes now the defendant above named, The First National Bank of Denver, by its attorneys, Hughes & Dorsey and Montgomery Dorsey, and as its separate answer to the plaintiff's bill heretofore filed herein, alleges and avers:

1. As to Subdivision I of said bill, admits The First National Bank of Denver is a banking corporation, organized under the laws of the United States of America, and is a citizen and resident of the State of Colorado and engaged in business in the State of Colorado.

Admits the amount in controversy, exclusive of interest and cost, is in excess of the sum and value of Three Thousand Dollars ($3,000.00).

Denies each and every other allegation in said subdivision I contained, for the reason that this defendant has not and can not obtain sufficient knowledge or information upon which to base a belief.

2. As to subdivision II of said bill, this defendant denies [fol. 2-] each and every allegation contained in said subdivision, for the reason that this defendant has not and can not obtain sufficient knowledge or information upon which to base a belief.

3. As to the third subdivision of said bill, this defendant admits that on or about the first day of November, 1929, said note, signed by said Buchhalter and secured by Trust Deed, was deposited in escrow in The First National Bank of Denver; admits said escrow instructions to the bank were to the effect that said note should be turned over to the purchaser from Buchhalter for cancellation and release of the Trust Deed securing the same upon the payment to said bank of all of the proceeds of said sale to be held by said bank until the said defendant, Joseph Buchhalter, and the said plaintiff, I. Rude, had agreed in writing as to the disposition of said proceeds.

Denies each and every other allegation contained in said third subdivision, for the reason that this defendant has not and can — obtain sufficient knowledge or information upon which to base a belief.

4. Admits each and every allegation contained in the fourth subdivision of said bill.

5. Denies each and every allegation contained in the first paragraph of the fifth subdivision of said bill, for the reason that this defendant has not and can not obtain sufficient knowledge or information upon which to base a belief.

As to the second paragraph of said fifth subdivision, this defendant admits that on or about November 18, 1929, on the instructions of the said Rude and the said Buchhalter, it made and executed and delivered to said parties its cashier's check for the sum of $16,365.34, which check was payable to the order of I. Rude and Joseph Buchhalter, jointly; that upon their joint instructions the said bank bought forty (40) shares of the capital stock of the Manhattan Trust Company at a price of $5,130.00, which stock was registered in the name of I. Rude; that upon said joint order this defendant applied the sum of $6,585.22 in payment of a certain note or notes then owing by the said Buchhalter to this defendant.

Denies each and every other allegation con*at*ined in the [fol. 28] said second paragraph and third paragraph of said fifth subdivision of said bill, for the reason that this defendant has not and can not obtain sufficient knowledge or information upon which to base a belief.

6. Admits each and every allegation contained in the first paragraph of the sixth subdivision of said bill.

As to the second paragraph of said sixth subdivision, this defendant denies each and every allegation therein contained, but alleges that on January 2, 1930, for value, the said Joseph Buchhalter assigned to The First National Bank of Denver for the purpose of securing said bank to the extent of $1250.00 all of his right, title and interest in and to that certain escrow hereinabove referred to.

As to the third paragraph of the sixth subdivision of said bill, this defendant admits that the escrow agreement provides that all bonds and cash received thereunder shall be held by said band until such time as I. Rude and Joseph Buchhalter have agreed in writing concerning the disposition thereof; denies that this defendant has refused to recognize the lien of the plaintiff and refused to sell said bonds for the purpose of satisfying said lien and refused to deliver said bonds or cash to plaintiff without the written

agreement of Joseph Buchhalter, for the reason that no such demands have been made upon this defendant; but alleges that if such demands had been made, this defendant would have refused to comply therewith; denies each and every other allegation in said third paragraph of the sixth subdivision for the reason that this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

7. As to the seventh subdivision of said bill, this defendant admits that on or about the 11th day of March, 1930, G. Dexter Blount, Harry S. Silverstein and David Rosner, Co-partners, doing business as Blout, Silverstein, and Rosner, issued a garnishment against this bank, attaching the interest of Joseph Buchhalter, as well as the interest of I. Rude; admits that the lien created by said attachment and garnishment is secondary and subject to the lien of the bank; denies each and every other allegation contained in the seventh subdivision of the said bill, for the reason that this defendant has not and can not obtain sufficient knowledge or information upon which to base a belief.

[fol. 29] Wherefore this defendant prays that this Court will enter an order herein, decreeing that the above mentioned assignment of the interest of Joseph Buchhalter to this defendant be declared to be a first and prior lien as to that interest; for instructions of this court as to the disposition of said cash and bonds; for costs and attorney's fees incurred herein, and for such other and further relief as to this court may seem meet and proper.

Hughes & Dorsey, Montgomery Dorsey, Attorneys for Defendant The First National Bank of Denver.

Duly sworn to by J. C. Houston. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

MOTION TO MAKE MORE SPECIFIC PART OF SEPARATE ANSWER OF DEFENDANT JOSEPH BUCHHALTER—Filed April, 21, 1930

Comes now the plaintiff, I Rude, by his attorney, Grant, Ellis, Shafroth and Toll, and moves that defendant Joseph

Buchhalter be required to make his answer more specific in the following particular, to-wit:

In the second paragraph on page 12 that he be required to set forth specifically what was the "accurate and proper amount and share of said aggregate sums and bonds" that he alleges that he was at all times willing said plaintiff should receive;

And as ground therefor, plaintiff says that the same is [fol. 30] indefinite and uncertain, and insufficient to inform the plaintiff what he alleges he was willing plaintiff should receive.

Grant, Ellis, Shafroth & Toll, W. W. Grant, Jr., Morrison Shafroth, Attorneys for Plaintiff.

In United States District Court

Motion to Strike Parts of Separate Answer of Defendant Joseph Buchhalter—Filed April 21, 1930

Comes now the plaintiff, I. Rude, by his attorneys, Grant, Ellis, Shafroth & Toll, and moves that the following portions of the separate answer of Joseph Buchhalter be stricken:

All of that portion of Section II commencing in the fifth line of page 2 of said answer with the words, "but in this behalf avers and alleges said plaintiff" etc. and including all of the balance of page 2, all of page 3, all of page 4, and including all of the first paragraph on page 5, ending with the words, "that then also should same be cancelled and destroyed."

Also in Section V, commencing in the third line of page 8, the following language: "and in this behalf again avers that said note was delivered by this defendant to said plaintiff upon the sole condition that he, the said plaintiff, would never seek or attempt to enforce the same or any part thereof as against either this defendant or any other person"; also in Section V, commencing on page 8 in line 12 with the words, "and in this behalf", and continuing through the first line on page 9.

Also on page 12, commencing in line 2 thereof, with the words, "in that said plaintiff, after the consummation",

and including all of the rest of said paragraph ending with the words, "as against this defendant said pretended and fictitious note and deed of trust".

Also all of Section VIII, commencing on page 13, down to the prayer on page 14.

And as ground therefor plaintiff says that the same as immaterial, irrelevant, have no bearing on the issues in [fol. 31] this case, constitute no defense herein, are argumentative and statement of legal conclusions.

Grant, Ellis, Shafroth & Toll, W. W. Grant, Jr., Morrison Shafroth, Attorneys for Plaintiff.

In United States District Court

Motion to Strike Parts of Answer of G. Dexter Blount, Harry Silverstein, David Rosner, Copartners Doing Business as Blount, Silverstein & Rosner—Filed April 21, 1930

Comes now the plaintiff, I. Rude, by his attorneys, Grant, Ellis, Shafroth and Toll, and moves that the following portions of the separate answer of G. Dexter Blount, Harry Silverstein, David Rosner, Co-Partners doing business as Blount, Silverstein & Rosner, be stricken, to-wit:

In Section II, all of paragraph 2 thereof commencing on page 2, and continuing down to Section III on page 3, said paragraph commencing, "And in this behalf, these defendants are informed and believe and so allege that said plaintiff and said Rude were then and prior thereto jointly interested" etc.;

And as ground therefor says that the same is immaterial irrelevant and has no bearing on the issues in this case.

Grant, Ellis, Shafroth, & Toll, W. W. Grant, Jr., Morrison Shafroth, Attorneys for Plaintiff.

In United States District Court

[Final Hearing]

Thirty-fourth Day, May Term, Thursday, July 17th A. D. 1930

Present: The Honorable J. Foster Symes, District Judge and other officers as noted on the sixteenth day of May, A. D. 1930.

This cause comes on to be heard on final hearing on the bill of complaint, and the separate answers of Joseph Buchhalter, Blount, Silverstein and Rosner and The First Na- [fol. 32] tional Bank of Denver, Morrison Shafroth Esquire, appearing as solicitor for the plaintiff, Henry E. Lutz, Esquire appearing as solicitor for the defendant Joseph Buchhalter; Harry S. Silverstein, Esquire, appearing for the defendants Blount, Silverstein and Rosner and Montgomery Dorsey, Esquire, appearing as solicitor for the defendant The First National Bank of Denver.

And thereupon, the court hears the evidence produced herein to the hour of adjournment.

Sixty-first Day, May Term, Thursday, September 25th, A. D. 1930

Present: The Honorable J. Foster Symes, District Judge, and other offices as noted on the sixteenth day of May A. D. 1930.

This cause comes on to be further heard on final hearing, Ernest Morris, Esquire, appearing as solicitor for the plaintiff and Henry E. Lutz, Esquire, appearing as solicitor for the defendant, Joseph Buchhalter, and Montgomery Dorsey, Esquire, appearing as solicitor for the defendant The First National Bank of Denver.

And thereupon, the court hears the evidence produced herein the hour of adjournment.

Sixty-second Day, May Term, Friday, September 26th A. D. 1930

Present: The Honorable J. Foster Symes, District Judge, and other officers as noted on the sixteenth day of May A. D. 1930.

This cause comes on to be further heard on final hearing, Ernest Morris, Esquire, appearing as solicitor for the plaintiff; Henry E. Lutz, Esquire, appearing as solicitor for the defendant, Joseph Buchhalter, and Montgomery Dorsey, Esquire, appearing as solicitor for the defendant The First National Bank of Denver.

And thereupon, the court hears the evidence produced herein the hour of adjournment.

[fol. 33] Second day, November Term, Wednesday, November 5th, A. D. 1930

Present: The Honorable J. Foster Symes, District Judge, and other officers as noted on the fourth day of November, A. D. 1930.

This cause comes on to be further heard on final hearing, Ernest Morris, Esquire, appearing as solicitor for the plaintiff; Henry E. Lutz, Esquire, appearing as solicitor for the defendant Joseph Buchhalter and Montgomery Dorsey, Esquire, appearing as solicitor for the defendant The First National Bank of Denver.

And thereupon, the court hears the evidence produced herein to the hour of adjournment.

Third day, November Term, Thursday, November 6th, A. D. 1930

Present: The Honorable J. Foster Symes, District Judge, and other officers as noted on the fourth day of November, A. D. 1930.

This cause comes on to be further heard on final hearing, Ernest Morris, Esquire, appearing as solicitor for the plaintiff; Henry E. Lutz, Esquire appearing as solicitor for the defendant, Joseph Buchhalter and Montgomery Dorsey, Esquire, appearing as solicitor for the defendant The First National Bank of Denver.

And the court having heard the evidence produced herein and the arguments of counsel, doth take the matter under advisement.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING PLAINTIFF TO FILE PETITION FOR REHEARING —Feb. 4, 1931

This cause comes on now to be heard, Ernest Morris, Esquire, appearing as solicitor for the plaintiff. And thereupon, on his motion:

[fol. 34] It is ordered by the court that the plaintiff may file herein a petition for a re-hearing within ten (10) days from this day as he shall be advised.

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING—Filed Feb. 13, 1931

(3/30/31.—Denied. Exceptions taken.)

Comes now the above named plaintiff, by his attorney, Ernest Morris, and by leave of court, files this petition for rehearing and prays that the court vacate its Memorandum filed herein on January 30th, A. D. 1931, and grant plaintiff a rehearing upon the evidence already adduced in this cause. And, as grounds for this petition, plaintiff respectfully shows unto the Court the following, to-wit:

I

The court has inadvertently and erroneously assumed that there was a written escrow agreement between Rude and Buchhalter determining their respective rights in the proceeds of sale and that Rude is attempting to establish an oral modification of such a writing.

1. In the first paragraph of the memorandum opinion dated January 30, 1931, the Court states that the cash and bonds in question are held by the First National Bank of Denver "pursuant to an escrow agreement, dated November 15, 1929, between Rude and Buchhalter, instructing the bank to hold the said assets until they should agree in writing concerning the disposition thereof."

We respectfully call the Court's attention to the fact that there was no escrow agreement between Rude and Buchhalter and there does not appear to have been any agreement of any kind between any parties on November 15, 1929.

2. On page 8 of the memorandum opinion the court says in part:

"The escrow agreement is not disputed and the same has been partly performed. Any oral modification thereof by

Buchhalter would have been voluntary and without consideration."

[fol. 35] "A modification of an existing contract amounts to a new agreement, and as long as it remains executory a new consideration is necessary to support it. It must contain all the requisites of a valid and enforceable agreement, and cannot be bottomed on mere indefinite expressions and negotiations.

"I am therefore of the opinion that the escrow agreement —concerning which there is no dispute—was never modified and is still in force and effect. It follows, therefore, that the bill should be dismissed as to Buchhalter."

Plaintiff respectfully calls attention to the fact that there is nothing in any of the escrow instructions which even touches upon the respective interests of Rude and Buchhalter in the proceeds of sale.

II

The court has inadvertently and erroneously assumed that, up to the moment of the conversation in the bank, there existed an agreement between Rude and Buchhalter that they should share alike in the proceeds of the sale and in proportion to the respective amounts they had invested in the paper mill.

1. The Court's attention is respectfully called to the fact that there is not a scintilla of evidence anywhere in the record that any such agreement ever existed, except Buchhalter's version of the telephone conversation (denied by Rude) on October 16, 1929.

2. The court inadvertently overlooked the testimony of Rude and Buchhalter's witness, Block, which established an agreement early in September whereby Rude was to have cash in case Buchhalter sold to Binstock and whereby Rude was not to take any bonds.

III

The court erred in holding that the agreement at the bank was not supported by the surrounding circumstances or sufficient testimony.

On page 7 of the memorandum, speaking of the agreement at the bank, the court says: "It is not supported by the [fol. 36] other testimony or the surrounding circumstances."

In so stating, it is respectfully submitted that the court overlooked or misapprehended the agreement made in Block's presence about September 4, 1929, whereby Rude was to have all the cash which came into the bank and Buchhalter was to pay him the balance due him in six months or a year.

IV

The court erred in holding that the agreement at the bank was not supported by a sufficient consideration.

V

The court has erroneously assumed that, because the escrow agreement was never modified, therefore the bill should be dismissed as to Buchhalter.

VI

In stating that what plaintiff really seeks in this suit is damages for the breach of an oral agreement, the court has inadvertently overlooked the fact that this is a suit to foreclose an equitable lien and to enforce a trust.

VII

The court erred in excluding exhibit "L."

VIII

The court erred in excluding the offered testimony of Mrs. Mary H. Isham.

IX

The court erred in excluding the offered testimony of Charles B. Myers.

X

The court erred in excluding the offered testimony of Mrs. Charles B. Myers.

XI

The court erred in admitting oral evidence to the effect that the note and trust deed were orally agreed not to be of any force or effect.

[fol. 37] XII

The court erred in excluding the offer of proof by the testimony of plaintiff as to the object and substance of the telephone conversation between Rude and Buchhalter when Rude was in New York and Buchhalter in Denver.

XIII

The opinion, findings and conclusions of law contained in the memorandum are contrary to the evidence.

XIV

The opinions, findings and conclusions of law contained in the memorandum are contrary to the law.

Ernest Morris, Attorney for Plaintiff.

In United States District Court

Order Denying Petition for Rehearing—March 30, 1931

And before Honorable J. Foster Symes, District Judge, the following proceedings were had:

This cause comes on now to be heard on the petition for a rehearing, and is argued by counsel, Ernest Morris, Esquire, appearing as solicitor for the plaintiff and Henry E. Lutz, Esquire appearing as solicitor for the defendants. And thereupon, upon consideration thereof:

It is ordered by the court that the said petition be, and the same is hereby denied.

[fol. 38] IN UNITED STATES DISTRICT COURT

REQUESTED FINDING OF FACTS AND CONCLUSIONS OF LAW—
Filed April 7, 1931

(Refused)

In the cause above entitled, the Court, upon the evidence makes the following findings of fact and conclusions of law, to-wit.

Findings of Fact

1. That as between the plaintiff, Rude, the defendant, Buchhalter, the purported promissory notes for the sum of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars, bearing date of August 29, 1929, signed by said defendant Buchhalter as maker and in favor of said Rude as payee, did not in truth and in fact either at the time of making the same, or thereafter, represent any obligation whatsoever. Nor did the alleged trust deed purporting to secure said note, represent, as between said parties, any obligation whatsoever. That both of said instruments were subsequently cancelled by the full agreement of both of said parties.

2. The court finds that the plaintiff abandoned his claim as to the validity of the note and trust deed, after all the evidence of the case was in, and attempted thereafter, arguendo, to rely solely on the alleged oral promise of said Buchhalter to said Rude at the First National Bank in Denver, on November 18, 1929.

3. That as respects the further sum of Seven Thousand Five Hundred ($7,500.00) Dollars, claimed and set forth in the bill of complaint herein as an obligation on the part of said defendant Buchhalter to said plaintiff Rude, same likewise at all times was, and is, without force or effect as against said defendant Buchhalter.

4. That one Max Bronst*ein* and the plaintiff Rude, were joint purchasers at master's sale in the State Court of the properties of the Colorado Pulp and Paper Company: that the defendant Buchhalter was actually, though for a time silently, interested with said Rude to the extent of approxi-

mately one-half of the interests so acquired by said Rude, this is, approximately one-fourth of the total with the said Bronstein, and associates owning the remaining undivided one-half so acquired under said sale.

5. Said plaintiff Rude was at all times in the bill of com- [fol. 39] plaint mentioned, under contract with the said Bronstein, with relationship to the management and financing of said interests, so acquired, and was likewise under promise and contract with said Bronstein that the defendant Buchhalter should not be in the transaction and especially should have nothing to do with the management of the interests so acquired, but that notwithstanding such contract, said Rude, along with said Buchhalter, entered into what may be characterized as a campaign against the said Bronstein so as to create dissatisfaction and difficulties in connection with said property and in order to force and coerce said Bronstein to purchase the interests theretofore acquired and held by said Rude but in reality owned as aforesaid by said Rude along with said Buchhalter, in approximately equal proportions.

6. That in the efforts to effectuate the campaign referred to, supra, the scheme of transferring the undivided one-half interest then held by said Rude to said Buchhalter, was devised and carried out, on to-wit August 29, 1929; that the note and trust deed mentioned, supra, were co-incidentally executed in order to impart apparent reality to the transaction so far as Bronstein and associates might be concerned. In the same way and for the same purpose, Buchhalter gave Rude a letter of contemporaneous execution, apparently acknowledging a further indebtedness to Rude of the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, referred to, supra.

7. That after the transfer of said interests to Buchhalter's name, negotiations at once proceeded by the latter to dispose of the property, that is, the one-half to the holders of the remaining one-half, to-wit, Bronstein and associates. After divers negotiations a sale was effected to one Binstock, an associate of said Bronstein, the deal having been closed approximately on the basis of a cash payment of Twenty-eight Thousand ($28,000.00) Dollars and the balance in bonds of the par value of Ninety-two

Thousand Five Hundred ($92,500.00) Dollars or a total of bonds and cash of approximately One Hundred Twenty Thousand Five Hundred ($120,500.00) Dollars.

8. The evidence establishes that while the plaintiff Rude seemed to have objected to accepting anything other than cash for his share, that none the less, the transaction pro- [fol. 40] ceeded with his apparent, though possibly reluctant consent, along the lines stated, and said funds and bonds were deposited in escrow in the First National Bank of Denver where they still remain (except as hereinafter noted) under escrow instructions, agreed to by said plaintiff and said defendant Buchhalter and said bank, as follows: "Until Joseph Buchhalter and I. Rude have agreed in writing concerning the disposition of said proceeds."

9. The plaintiff apparently first conceived the idea to rely upon the purported promissory note for Sixty-Seven Thousand Five Hundred ($67,500.00) Dollars referred to supra and to claim it as an obligation in his favor and as against said Buchhalter, after the consummation of the Binstock deal and on October 12, 1929, by letter to the Denver National Bank. He requests that bank to do certain things with the note and states the terms upon which he was willing to surrender it; that prior to this occasion it was at all times agreed by and between said Rude and said Buchhalter that said note would be surrendered by Rude whenever necessary to effectuate this transaction. The escrow agreement mentioned supra was subsequent. The court having found said note to be and have been of no validity as between Buchhalter and Rude and the claim thereof to have been abandoned after the evidence was all in, now finds said Rude to have attempted a fraud as against said Buchhalter and an imposition upon this court by seeking to make said note the basis and foundation of the case at bar.

10. That defendant Buchhalter did not promise or agree to and with said Rude at the First National Bank in Denver, Colorado, on November 18, 1929, or elsewhere or at all, to pay said Rude in cash the amount sued for herein, to-wit: the amount of said note and the other item claimed and further finds *that* the testimony of said Rude in such behalf to be unworthy of belief. Likewise found that Buchhalter did not at said time or place or elsewhere or at all, promise

said Rude that he, the said Rude, should have a lien on all or any, of the bonds or funds then in escrow in said bank to secure either the alleged balance due on said mentioned note and the other item, or any such alleged promise to pay cash as claimed by Rude.

11. The court further finds that there are very many inconsistencies, as well as contradictions in the entire testi- [fol. 41] mony of the plaintiff and finds that said plaintiff has wholly failed to establish his case, either by requisite legal proof or at all.

12. The court further finds, pursuant to agreement, that the plaintiff Rude and the defendant Buchhalter withdrew the following funds from the escrow on November 18, 1929, to-wit: approximately Eleven Thousand Six Hundred Fifteen and 22/100 ($11,615.22) Dollars by Buchhalter and approximately Sixteen Thousand Three Hundred Sixty-five and 34/100 ($16,365.34) Dollars by Rude; that Five Thousand ($5,000.00) Dollars of the latter sum was shortly thereafter paid to the firm of Blount, Silverstein & Rosner on account of attorneys' fees.

13. It is further found that the plaintiff Rude does not claim to own any of the bonds or funds in said escrow but claims an interest therein only by way of lien, or as security for the amount sought in this suit.

14. The court finds that the defendant Buchhalter is not indebted to the plaintiff Rude in any sum whatsoever for or on account of said mentioned promissory notes or said item of Seven Thousand Five Hundred ($7,500.00) Dollars or for or on account of any other matter or thing in manner and form as alleged and pleaded in the bill of complaint herein.

15. As respects the defendants, Blount, Silverstein & Rosner, it appears that their claim of lien against the funds in escrow in said First National Bank, is in process of determination in the State Court.

16. As respects the defendant, the First National Bank it appears that their claim of lien in the sum of One Thousand Two Hundred Fifty ($1,250.00) Dollars exists as against said escrow and said Buchhalter.

17. It is further found that the plaintiff Rude, prior to the institution of this suit, threatened the defendant Buch-

halter with adverse publicity unless he, the said Buchhalter, would make a settlement satisfactory to him, the said Rude, and further that said Rude testified that it was his intention and purpose to "break" the defendant Buchhalter.

Conclusions of Law

From the aforesaid findings of fact, it is concluded, as a matter of law:

[fol. 42] 1. That said plaintiff Rude is not in court with clean hands by reason of:

(a) His campaign against his contractional associate Bronstein with relation to the said subject matter herein sued on and his efforts to coerce a purchase of his interests by said Bronstein.

(b) His threats of adverse publicity against the defendant Buchhalter in connection with the subject matter of this suit and in an endeavor to force a settlement satisfactory to himself, coupled with his admission from the witness stand of his attempt to "break" the defendant Buchhalter.

(c) That his entire cause of action, as pleaded and set forth, was and must have been, at all times, known to plaintiff as having no foundation in fact.

(d) Plaintiff's testimony respecting the subject matter of this suit, which the court is constrained to find in large part false.

2. That by instituting suit upon the alleged and purported note in question and seeking a personal judgment against the defendant Buchhalter on such account and alleging and seeking a lien on the said escrow funds and bonds, to gratify such judgment, the plaintiff has not only by his testimony but as a matter of law, denied any ownership of said escrow funds and bonds and is now precluded and estopped to assert any such ownership therein.

3. That the bill herein must also be dismissed for want of equity.

4. That plaintiff be remitted to such action at law as he may be advised that he has or may have against the de-

fendant Buchhalter and in this connection the court further finds, as a matter of law, that by the institution of this suit the plaintiff Rude breached and abandoned the said escrow agreement hereinbefore referred to.

5. That the defendant, the First National Bank having prayed instructions as to the disposition of said escrow funds and bonds, it is hereby directed to turn all and singular, the same over to said defendant Buchhalter subject only to its own lien thereon in the sum of One Thousand Two Hundred Fifty ($1,250.00) Dollars and accrued interest, if any, and subject to any order of the State Court respecting [fol. 43] the claim of the defendants, Blount, Silverstein & Rosner. The court is further impelled to this conclusion because of the admission in open court by counsel for the plaintiff, that the legal title to said escrow funds and bonds rests in the defendant Buchhalter. In any event, in view of these findings and said admission, the said Rude is without right, title or interest in and to said escrow proceeds and same could only constitute a property against which execution might issue if and should the plaintiff Rude procure a judgment at law against said Buchhalter; that no reason or right exists to keep said escrow proceeds longer impounded any more than to impound any other property of said Buchhalter for such prospective purpose; that said defendant, the First National Bank, be allowed its costs herein expended, and an attorney's fee in the sum of Two Hundred Fifty ($250.00) Dollars, said sums to be paid out of the funds in its possession as escrow holder.

6. That as respects the defendant, Blount, Silverstein & Rosner, the case stands dismissed inasmuch as their rights, if any, should be determined in the proceeding now pending in the State Court with respect thereto.

7. That all costs herein shall be taxed to the plaintiff; that a decree be presented accordingly.

By the court:

—— ——, Judge.

The above and foregoing findings respectfully tendered in behalf of the defendant Buchhalter, and concurred in and approved by the defendant, First National Bank.

4/7/31.—Submitted & refused.

J. Foster Symes.

In United States District Court

Findings of Fact and Conclusions of Law—Filed April 7, 1931

The court, having heard the evidence and the arguments of counsel herein:

Doth find:

1. That plaintiff and defendant Buchhalter were jointly [fol. 44] interested in the properties theretofore belonging to the Colorado Pulp and Paper Company; and that on August 16th, A. D. 1929, plaintiff's investment in said properties was $61,000.00 in principal and that of defendant Buchhalter's was $53,992.00.

2. That the purported note for $67,500.00 and the deed of trust securing the same, both executed by defendant Buchhalter in favor of plaintiff, were surrendered, cancelled and released.

3. That on October 10th, A. D. 1929, defendant Buchhalter and one, Morris Binstock, entered into an escrow agreement with the First National Bank of Denver to which escrow agreement plaintiff became a party on October 17th, A. D. 1929, with the understanding that the proceeds from said escrow received by said Bank should be held until defendant Buchhalter and plaintiff have agreed in writing concerning the disposition of said proceeds.

4. That plaintiff and defendant Buchhalter withdrew the following funds from said escrow on November 18, 1929, to-wit: $11,615.22 by said Buchhalter and $16,365.34 by plaintiff; and that $5,000.00 of that latter sum was disbursed by check of plaintiff, payable to defendant Buchhalter who endorsed the same to defendants Blount, Silverstein & Rosner on account of attorney's fees.

5. That said escrow agreement is still in full force and effect and has never been modified by plaintiff and defendant Buchhalter.

And in accordance with the foregoing findings of fact, the court makes the following.

Conclusions of Law

1. That the bill herein should be dismissed on the merits as to all of the defendants.

1. That all cost should be taxed to plaintiff, (to each of which findings of fact and to each of which conclusions of law plaintiff objects and excepts.)

Done at Denver, this 7th day of April, A. D. 1931.
By the Court.

J. Foster Symes, Judge.

[fol. 45] In United States District Court

Decree—Filed April 7, 1931

This cause came on to be further heard at this term and was argued by Counsel; and thereupon, upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

1. That the bill herein be and the same is hereby dismissed on the merits as to all of the defendants.

2. That all costs be taxed to plaintiff, (to each of which plaintiff objects and excepts.)

Done at Denver this 7th day of April, A. D. 1931.
By the court:

J. Foster Symes, Judge.

In United States District Court

Motion to Amend Final Decree—Filed April 7, 1931

(4/7/31.—Denied.)

Comes now Joseph Buchhalter, one of the defendants above named, by his attorney, and respectfully moves this Honorable Court to amend the final decree in the cause above entitled in respects following, to-wit:
So as to Provide Further:

1. That this cause be also dismissed because the plaintiff is not in court with clean hands.

2. That said plaintiff be remitted to such remedy or remedies at law as he may be advised he possesses in the premises.

3. That defendant, the First National Bank, as escrow holder, be directed and required to turn over and deliver unto said defendant, Jospeh Buchhalter, all and singular, the escrow funds and bonds, subject only to any claims against the same by said bank, and said defendants, Blount, Silverstein & Rosner.

4. And in this behalf this defendant respectfully represents and shows that failing the inclusion in said final decree of the matters and things hereinabove set forth, this [fol. 46] Honorable Court has wholly failed to finally adjudicate the said controversy between said plaintiff and defendants and their respective equitable rights in and to the funds and bonds in said escrow. Further that the cause of action as set forth by said plaintiff was and is only and solely upon the purported and pretended obligation of an alleged promissory note in the principal sum of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars (together with a further alleged item of Seven Thousand Five Hundred ($7,500.00) Dollars). In other words, said plaintiff sought only a personal judgment against said defendant, Joseph Buchhalter, and the payment of the same through a medium of an equitable lien on and against said escrow funds and bonds, and in open court and upon the witness stand, repeatedly testified such was his only cause of action against said defendant Buchhalter. Further, counsel for said plaintiff, in open court, conceded and admitted that the legal title to all and singular of said escrow funds and bonds was, and is, in said defendant Buchhalter. And yet again, as a matter of law, the whole theory of said plaintiff's suit necessarily entailed the position that said defendant, Joseph Buchhalter, was, and is, vested with the legal title to said escrow funds and bonds and that hence no right or reason exists, or can exist, to keep said escrow funds and bonds longer impounded in the custody of said defendant, the First National Bank.

Further, that whatever may have been the respective rights or interests of said plaintiff Rude, and said Buchhalter, in and to said escrow funds and bonds, prior to the institution of this suit by said plaintiff herein, the said plaintiff having elected and chosen as his pretended remedy, the personal judgment as against said Buchhalter on said alleged promissory note, and an equitable lien to secure

the same against said escrow funds and bonds, that he is now forever barred, precluded and estopped in equity to assert or claim any personal interest or ownership whatsoever in and to said escrow funds and bonds, or any thereof. That such is the inevitable legal and equitable consequence of the action of said plaintiff in and by the institution of his said suit herein, and his attempt to maintain the same, and it is not the policy of equitable jurisprudence to allow, or permit, any suitors or litigants, whomsoever, to alternately assert contrary, inconsistent or completely contradictory statements of alleged fact, as [fol. 47] the basis of recovery, or the assertion of alleged right.

Wherefore Defendant moves and prays that the final decree herein be modified and amended in the respects as above indicated.

Henry E. Lutz, Attorney for Defendant Joseph Buchhalter.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO AMEND FINAL DECREE—April 7, 1931

This cause comes on now to be heard on the application of the defendants to amend the final decree, Ernest Morris, Esquire, appearing as solicitor for the plaintiff and Henry E. Lutz, Esquire, appearing as solicitor for the defendants, and is submitted to the court. Thereupon, upon consideration thereof:

It is ordered by the court that the said application be, and the same is hereby denied.

Exception allowed.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 13, 1931

To the Honorable J. Foster Symes, District Judge:

The above named Joseph Buchhalter, defendant, feeling aggrieved by the decree rendered and entered in the above

entitled cause on the 7th day of April, A. D. 1931, does hereby appeal from said decree to the Honorable, the Circuit Court of Appeals of the United States for the Tenth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and he prays that this, his appeal, be allowed, that citation be issued as provided by law, and that a transcript of the record of the proceedings, documents and papers upon which said decree was based, duly authenticated, be sent to said the United States Circuit Court of Appeals for the Tenth Circuit, according to law, and [fol. 48] under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of him, be made.

Henry E. Lutz, Attorney for Defendant Joseph Buchhalter.

Appeal allowed as above prayed. Bond on appeal fixed in the sum of $750.00.

By the Court, April 13, 1931.

—— ——, Judge.

In United States District Court

Order Allowing Appeal—April 13, 1931

This cause comes on now to be heard, Henry E. Lutz, Esquire, appearing as solicitor for the defendant, Joseph Buchhalter.

And thereupon the defendant, Joseph Buchhalter, prays an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, from the Decree herein, which is hereby allowed to him. And bond on such appeal shall be in the sum of Seven Hundred and Fifty Dollars ($750.00).

In United States District Court for the District of Colorado

9209

Assignment of Errors—Filed April 13, 1931

4/13/31.—Approved. J. Foster Symes, Judge.

Comes now Joseph Buchhalter, one of the defendants above named, and files the following assignment of errors,

upon which he will rely upon his prosecution of the appeal [fol. 49] in the above entitled cause, from the decree made by this Honorable Court, on the 7th day of April, A. D. 1931.

1. That the United States District Court, for the District of Colorado, erred in failing and refusing to find the facts and enter a decree in conformity with all and singular the requested findings tendered by this defendant and appellant.

2. That said court erred in failing and refusing to find and decree:

(a) That the purported promissory note for the sum of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars, bearing date of August 29, 1929, signed by said defendant Buchhalter as maker, and in favor of said Rude as payee, did not, in truth and in fact, either at the time of making the same, or thereafter, represent any obligation whatsoever.

(b) That the alleged trust deed, purporting to secure said note, did not represent any obligation whatsoever as between said parties.

(c) That as respects the said sum of Seven Thousand Five Hundred ($7,500.00) Dollars, claimed and set forth in the bill of complaint herein, as an obligation on the part of said defendant Buchhalter, to said plaintiff Rude, was at all times, and is, without force or effect, as against said defendant Buchhalter.

(d) That said Rude entered into a so-called campaign of oppression against one Max Bronstein, an associate and partner of said Rude's, in the purchase of the mill property, testified to in suit.

(e) That said Rude attempted a fraud as against this defendant, and an imposition upon said court by seeking to make said mentioned note of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars as the basis and foundation for the case at bar, whereas the said Rude at all times knew same to be fictitious and of no validity force or effect.

(f) That this defendant did not promise, or agree, to and with said plaintiff Rude, at the First National Bank in

Denver, Colorado, on November 18, 1929, or elsewhere, or at all, to pay said Rude in cash, the amount sued for herein, to-wit, the amount of said mentioned and purported promissory note in the sum of Sixty-seven Thousand Five [fol. 50] Hundred ($67,500.00) Dollars, and that this defendant did not, at said time or place, or elsewhere, or at all, promise to him, the said Rude, a lien on all, or any, of the bonds or funds then in escrow in said bank, to secure either the alleged balance on said mentioned promissory note, or for any other matter, or at all.

(g) That said plaintiff Rude does not claim to own any of the bonds or funds in said escrow, but claimed only an interest therein by way of lien, as alleged security for the amount sought in suit.

3. The court erred in failing and refusing to find and decree upon the evidence, that said plaintiff Rude, was, and is, in court with unclean hands, and that his said suit was an attempted fraud, not only upon all the defendants, but also upon the court as well.

4. The court erred in failing and refusing to find and decree that this defendant and appellant, Joseph Buchhalter, was, and is, the owner of the legal title of all and singular the funds and bonds in escrow in the First National Bank of Denver, Colorado, upon which the said plaintiff sought to have impressed a lien for an alleged personal indebtedness, from this defendant to himself, the said plaintiff Rude.

5. The court erred in failing and refusing to order and direct the said First National Bank of Denver to turn over and deliver unto this defendant and appellant, all and singular, the funds and bonds in escrow in said bank and in dispute herein, in that it was and is conceded by said plaintiff that his sole right thereto, if any, is, and was, as security for the alleged and purported promissory note in suit, in the sum of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars, bearing date of August 29, 1929, executed by this defendant in favor of said Rude; further that it was admitted in open court, by the counsel for said Rude, that the legal title to said escrow deposit was, and is, in this defendant and appellant; further, by the very nature

of the suit herein, and involving said escrow funds and bonds, the legal title thereto is, and was, as a matter of law, conceded to be vested in this defendant and appellant.

6. The court erred in finding that the alleged escrow agreement between said Rude and this defendant and said [fol. 51] the First National Bank, was, and is, in full force and effect.

7. The court erred in failing and refusing to find and decree that the said Rude abandoned, breached, disclaimed and repudiated, the said alleged escrow agreement mentioned in suit, inasmuch as the said Rude instituted the suit herein on the alleged and pretended promissory note of August 29, 1929, in the sum of Sixty-seven Thousand Five Hundred ($67,500.00) Dollars; and further that it appears from the bill of complaint herein, that said alleged escrow agreement between said Rude and said bank and this defendant, was by him, the said Rude, disclaimed and abandoned.

8. The court having found and decreed that the bill of the plaintiff was and is without equity, and having denied judgment and the lien therein sought, erred in refusing to release the funds and bonds in escrow and involved in suit, to this defendant and appellant.

9. That inasmuch as all and singular the relief sought by the plaintiff herein, in his bill, to-wit, a personal judgment and a lien against said funds and bonds impounded in said escrow in said First National Bank, was denied by this Honorable court, the court erred in failing and refusing to find and decree that said First National Bank should be required to turn over and deliver all and singular, said funds and bonds to this defendant and appellant.

10. The escrow holder of said funds and bonds in suit, to-wit, the First National Bank of Denver, Colorado, having prayed, this Honorable court for instructions as to the disposition of said escrow funds and bonds, the court erred in failing and refusing to dissolve said escrow and to direct and require said bank to deliver the same unto this defendant and appellant.

11. The court erred in failing and refusing to do complete and full justice between the parties hereto and to finally

terminate and end the dispute and litigation over and concerning the property involved herein, to-wit, the said funds and bonds in escrow in said the First National Bank.

12. The court, having refused said plaintiff judgment, and having denied any lien upon or against said escrow funds and bonds to said plaintiff as by him sought and prayed, the court erred in merely dismissing said plain-
[fol. 52] tiff's bill and thus relegating the parties to further litigation respecting the said property in said escrow.

13. The court, having determined that said plaintiff was, and is, without right by way of lien to said escrow funds and bonds in suit, and said plaintiff, both in testimony and by his said suit, having conceded and admitted that the legal title thereto was and is in this defendant and appellant, no right or reason of any sort or nature exists, or obtains, or can exist or obtain, to withhold the possession thereof from this defendant and appellant. And the court erred in refusing to terminate said controversy and litigation so far as the corpus of said property is concerned, by ordering said escrow dissolved and its proceeds turned over unto this appellant.

14. The court erred in denying the motion of this defendant and appellant to modify its final decree in the respects sought in said motion, to-wit, so as to find and decree that said plaintiff Rude was, and is, upon the evidence, in court, with unclean hands; to remit the said plaintiff to such remedy or remedies at law as he may be advised, and to order and require the First National Bank of Denver, Colorado, as escrow holder of the funds and bonds in said escrow and involved in suit, be turned over and delivered unto this defendant and appellant.

15. The court erred in finding that as of date August 16, 1929, said plaintiff Rude had invested the principal sum of Sixty-one Thousand ($61,000.00) Dollars in the enterprise mentioned in suit, and that as of said date, this defendant and appellant, had invested the sum of Fifty-three Thousand Nine Hundred Ninety-two ($53,992.00) Dollars in that under the issues herein, such and said finding was, and is, wholly immaterial, and without force or effect, and relates to no issue herein whatsoever. And further that the evidence shows that the total investment by this defendant

and appellant subsequently reached the total of Fifty-eight Thousand Four Hundred Twenty-two and 32/100 ($58,422.32) Dollars.

Wherefore this appellant prays that the findings and decree of said the Honorable District Court of the United States for the District of Colorado, be modified and [fol. 53] amended in the respects following, to-wit: That it be found and decreed, or that said District Court be instructed to find and decree, that said plaintiff Rude came into Equity with unclean hands by reason of his said attempted fraud and imposition; that the legal title to all and singular of said mentioned funds and bonds in escrow, be held and declared to be in this defendant and appellant; that the First National Bank of Denver, Colorado, as escrow holder of said funds and bonds, be directed and required to turn over and deliver unto this defendant, all and singular, the same; that full and complete justice herein be done; and for such other relief as the facts warrant.

Henry E. Lutz, Attorney for Appellant Joseph Buchhalter.

[Bond on appeal in the sum of $750 approved by the District Judge with Appellant Joseph Buchhalter as principal and Moses Buchhalter and Abe Salisman as sureties, was filed in the District Court on April 13, 1931.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD ON APPEAL—Filed April 13, 1931

Comes now the above named defendant, Joseph Buchhalter, appellant herein, by his attorney, and respectfully requests the Clerk of this Honorable Court to prepare a record on appeal herein to the Circuit Court of Appeals of the Tenth Circuit, the same to consist of the matters following, to-wit:

Bill of Complaint.
Answer of Defendant, Buchhalter.
Answer of Defendants, Blount, Silverstein and Rosner.
Answer of Defendant, The First National Bank.
Plaintiff's Motion to Make Answer More Specific.

Plaintiff's Motion to Strike Portions of the Answer of the Defendant, Joseph Buchhalter.

Plaintiff's Motion to Strike Portions of the Answer of the Defendants, Blount, Silverstein & Rosner.

Order, Dated 7-17-30, re Final Hearing of Evidence to Adjournment.

[fol. 54] Order, Dated 9-25-30, re Final Hearing of Evidence to Adjournment.

Order, Dated 9-26-30, re Final Hearing of Evidence to Adjournment.

Order, Dated 11-5-30, re Final Hearing of Evidence to Adjournment.

Order, Dated 11-6-30, re Final Hearing of Evidence to Adjournment.

Order, Taking Case Under Advisement.

That Certain Notation of the Honorable J. Foster Symes, Judge, on the Testimony of Plaintiff, Rude on Direct, filed 1-30-31, reading as follows: "Morris agrees that note has been waived and no action can be based thereon."

Judge's Memorandum.

Order, Permitting the filing of Petition for Rehearing.

Petition for Rehearing, and ruling thereon.

Findings of Fact and Conclusion of Law as requested by Defendant Buchhalter and ruling thereon.

Findings of Fact and Conclusions of Law as entered.

Final Decree.

Buchhalter's Motion to Amend Final Decree, and ruling thereon.

Condensed Statement of Evidence, and Court's Approval thereof.

Buchhalter's Petition for Appeal and Allowance thereof.

Citation on Appeal, and Acceptance of Service.

Bond on Appeal.

Assignments of Error.

Notice to Plaintiff's Counsel re Lodging Condensed Statement of Evidence.

Acknowledgment of Service thereof.

Notice to Plaintiff's Counsel of filing of this Præcipe.

[fol. 55] Copy of this Præcipe.

Clerk's Certificate to Record.

Henry E. Lutz, Attorney for Defendant and Appellant Joseph Buchhalter.

Dated this 13th day of April, A. D. 1931.

In United States District Court

Notice—Filed April 14, 1931

To the above-named plaintiff and appellee, I. Rude, and to Ernest Morris, Esq., his attorney:

Please take notice that on this, the 13th day of April, A. D. 1931, the undersigned Joseph Buchhalter as Appellant, by his attorney, in the cause above entitled, has lodged with the Clerk of the District Court of the United States for the District of Colorado, at said Clerk's office in Denver, Colorado, a condensed statement of the evidence in said cause, to be used by Appellant on appeal herein.

You are further advised, pursuant to the Equity Rule in such behalf prescribed, said statement is subject to your examination, and further, the undersigned Appellant will, on April 25th, A. D. 1931, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, ask the said District Court, or the Honorable J. Foster Symes, Judge thereof, to in all things approve the same.

Henry E. Lutz, Attorney for Joseph Buchhalter, Appellant.

Received a copy of the above and foregoing Notice on this 13th day of April, A. D. 1931.

Ernest Morris, Attorney for I. Rude, Appellee.

Marshal's Return

I, Richard C. Callen, United States Marshal within and for the District of Colorado, do hereby certify that on, to-wit, the 14th day of April, A. D. 1931, at or about the hour of — M., did serve Ernest Morris, attorney of record [fol. 56] herein, for the within named plaintiff and appellee, I. Rude, in the cause above entitled, at his office in the Symes Building, Denver, Colorado, by leaving with him, the said Morris, a true, perfect and correct copy of the within and foregoing Notice of the lodgement of the condensed statement of evidence on appeal.

Richard C. Callen, United States Marshal.

In United States District Court

Notice—Filed April 14, 1931

To the above-named plaintiff and appellee, I. Rude, and to Ernest Morris, Esq., his attorney:

Please take notice that on this, the 13th day of April, A. D. 1931, the undersigned Appellant in the cause above entitled, has filed a præcipe with the Clerk of the District Court of the United States for the District of Colorado, at said Clerk's office in Denver, Colorado, indicating the portions of the record to be incorporated into the transcript on such appeal, copy of which said præcipe is herewith handed you.

Henry E. Lutz, Attorney for Joseph Buchhalter, Appellant.

Received a copy of the above and foregoing Notice, together with a copy of said mentioned præcipe, this 13th day of April, A. D. 1931.

Ernest Morris, Attorney for I. Rude, Appellee.

Marshal's Return

I, Richard C. Callen, United States Marshal within and for the District of Columbia, do hereby certify that on, to-wit, the 14th day of April, A. D. 1931, at or about the hour of — M., did serve Ernest Morris, attorney of record herein, for the within named plaintiff and appellee, I. Rude, in the cause above entitled, at his office in the Symes Building, Denver, Colorado, by leaving with him the said Morris, a true, perfect and correct copy of the within and fore-[fol. 57] going Notice of the filing of a præcipe for the record on appeal, together with a copy of said præcipe.

Richard C. Callen, United States Marshal.

In United States District Court

Order Enlarging Return Day—May 12, 1931

This cause comes on now to be heard, Ernest Morris, Esquire, appearing as solicitor for the plaintiff and Henry E.

Lutz, Esquire, appearing as solicitor for the defendant Joseph Buchhalter. And thereupon on motion of the said defendant, and for good cause shown:

It is ordered by the court that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Tenth Circuit, be and the same is hereby enlarged and extended for thirty (30) days.

IN UNITED STATES DISTRICT COURT

Condensed Statement of the Evidence—Filed June 8, 1931; Lodged April 13, 1931

Trial Before Honorable J. Foster Symes, District Judge, July 17, A. D. 1930

Messrs. Grant, Ellis, Shafroth & Toll, attorneys for plaintiff.

Henry E. Lutz, Esquire, attorney for all defendants other than the First National Bank, which was represented by Montgomery Dorsey, Esquire.

EVIDENCE OF THE PLAINTIFF, I. RUDE

Direct examination.

By Mr. Shafroth:

That he is a merchant of Dallas, Texas, having resided there for about two years last past; pays a poll tax and is a citizen of the State of Texas. It is stipulated by counsel that all defendants are residents and citizens of the State of [fol. 58] Colorado and that the First National Bank is a banking corporation doing business in the last named state.

That on August 29, 1929, he was the owner of a one-fourth interest in the Colorado Pulp & Paper Company, and on said date also held in trust for Joseph Buchhalter another one-fourth interest in said property; that Max Bronstine and associates were the owners of the remaining one-half, Bronstine and Rude having entered into a written agreement to acquire this property. This contract was offered and received in evidence as Plaintiff's Exhibit A, without objection. That Buchhalter owned about one-half of the

bonds of the Colorado Pulp & Paper Company and that Rude controlled them; that Rude's investment on August 29, 1929, was $61,000.00 and interest from December 1, 1927, bringing it up to an approximate total of $67,500.00; that in addition to this, plaintiff had expended $2500.00 in attorney's fees.

Plaintiff identifies Exhibit B as a letter given by himself to Mr. Buchhalter, states that it is approved by Mr. Buchhalter and bears his signature. This exhibit is introduced by plaintiff without objection and appears hereinafter in the appendix hereto. It is dated August 16, 1929.

That after taking possession of the mill, Bronstine took active management, that before August 29, 1929, plaintiff and defendant Buchhalter had a number of conversations relative to the management and control of the mill; that in one of such conversations Buchhalter stated to plaintiff that Bronstine was "crooked" and would take advantage of the prospective absence of plaintiff Rude in Dallas, Texas, to sell everything in the mill; that Buchhalter wanted plaintiff "to keep on fighting with Bronstine to get him tired out," which plaintiff says he refused to do. Plaintiff said to give Bronstine a chance to see what he could be; that further conversations took place between Rude and Buchhalter after June 6, 1929, relative to the mill and its operation; that in one such conversation, "about August 25th," Buchhalter stated to plaintiff, "If you turn the property over to me, Bronstine will deal to buy me out in twenty-four hours." Plaintiff states that he didn't think so, being of the opinion that Bronstine was doing the best he could. "He (Buchhalter) said he didn't think so, he was waiting for me to leave the city." Subsequently, Buchhalter came to the proposition conveying the property to him. That was a [fol. 59] few days prior to August 29, 1929; "That I should transfer the property to him (Buchhalter) for the amount of money I got invested in it. The amount should be exactly the amount I got invested plus the interest, which amounted to approximately $67,500. He guaranteed me inside of a week he would have it all cash and the note would be paid out."

Q. How did he say he would have it paid out?
A. He said he would immediately effect a sale.

Buchhalter said he was going to pay for this property "by the mortgage." "He said he decided if I would take a mortgage for both interests, his and my interests, which amounted with the interest to $128,000, he said that in case Bronstine might put a partition suit—so that big mortgage would be against him—that it wouldn't take much cash to buy the property;" that plaintiff made no objection, but along with Buchhalter went up to see the plaintiff's attorney, one Charles Rosenbaum; that witness stated to Mr. Rosenbaum that Buchhalter had said "that if the property was in his name the sale would be immediately perfected and that his proposition was to make a deal for mine and his interest and the mortgage;"

Q. The mortgage for the full $130,000.00?

A. Yes, to me, and that I would give him back a letter showing his interest.

That Rosenbaum advised, "In case of a partition you wouldn't come into court with clean hands." "I says, 'How can they serve in Texas?' He says, 'It doesn't make any difference. They can serve by publication or the sheriff' I says, 'If that is the case I don't want to have anything to do with it,' and that thing was dropped." That further conversations were had between myself and Buchhalter relative to a conveyance "so finally we agreed that I would take a mortgage for the exact amount I have got in the property, and he should handle the proposition himself if he feels so sure he is going to make a sale, and he said he was going to buy the property from me; that he would give me all the cash. That is the words he used; inside of forty-eight hours he would have all the cash and the profit:" * * * "that he would give me a good profit." This was prior to August 29, 1929.

Plaintiff's Exhibit C, being a deed to the property in ques-[fol. 60] tion from plaintiff Rude to defendant Buchhalter, offered and received in evidence, purporting to convey an undivided one-fourth interest to defendant Buchhalter from plaintiff Rude, and reciting a consideration of $75,000.

There is next exhibited to the witness, Plaintiff's Exhibit D, the note and trust deed, of which plaintiff testifies:

"That is the note given me for the amount of money for the transfer," and identifies Mr. Buchhalter's signature

thereto. That the second part of this exhibit is the mortgage, likewise signed by Buchhalter, conveying back a one-fourth interest in the property to the plaintiff to secure the note. This exhibit is offered and received in evidence without objection. That at the time this deed and mortgage were given, Buchhalter said to plaintiff, "Well, I think it will be consummated, as I said, in the forty-eight hours, but there is always some condition. Suppose I can't pay it in six months?" (the maturity of the note). "I says, 'What time do you want?' 'Well,' he says 'it doesn't make any difference. I will have enough Cities Service stock at that time to pay. At that time I will sell the Cities Service.'" That in the event the mill was not sold, "I said, 'Well, Joe (Buchhalter) I will not foreclose on you if the mill isn't sold.' He says, 'Well, I will have enough to pay you; but I presume that if the note is not paid, you will not foreclose.' I said, 'You know I wouldn't foreclose on you if the property is not sold in six months; that I will extend the note.' I said that to him and he said, 'I wouldn't need any extension at that time'." At the same time and on the same day, plaintiff conveyed to Buchhalter the one-fourth interest in the property which he had theretofore held in trust for Buchhalter; that also at said time Buchhalter delivered a letter to plaintiff, which is introduced in evidence as Plaintiff's Exhibit E. This exhibit appears hereinafter in the Appendix hereto.

Q. What was said regarding the $7500 at the time this letter was given and at the time the deed and trust deed were executed?

A. That the $7500 was to be $2500 for the attorneys——

Mr. Lutz: Now, who said? You said or Mr. Buchhalter?

Q. Who was this conversation with?

A. With Mr. Buchhalter.

Q. Mr. Buchhalter?

A. Yes.

[fol. 61] Q. All right. Now, what was said and by whom?

A. We agreed that Buchhalter——

The Court: You were not asked what you agreed. You are asked to state what you said and he said.

A. (Continuing:) That we should agree on the amount of profits I was to have in case of a sale; that we should limit the profits——

Mr. Lutz: I still object as not responsive.

The Court: Strike it out. State what you said and he said.

Q. What did Mr. Buchhalter say regarding the $7500.00?

A. He said that he would give me $7500.00 in full payment of profits to me, in full settlement of all profits to me as my share, if there were profits made.

Q. If any profits were made by him in selling the mill——

A. That my profit should be limited to $7500.00.

Q. He would give you, did he say, what proportion of the profits up to $7500.00.

A. No, he would give me up to $7500.00, but not in excess. I understood it would be half of the profits he made.

Mr. Lutz: I move his understanding should be stricken.

The Court: If the witness cannot observe the caution of the court we will have to ask him to step down.

Q. Mr. Rude, try not to say what the parties agreed or what you understood, but simply try to say what you said and what Mr. Buchhalter said in these various conversations.

A. He said that I would accept $7500.00 in full payment of all the profits he made on the mill if there were profits made.

Q. In other words, you would make no claim for anything over $7500.00 of the profits that were made?

A. No.

Q. Did you have a conversation with Mr. Buchhalter a day or two after this conveyance? If so, when and where, and what was said?

A. I told Buchhalter that I would——

Mr. Lutz: Fix the time and place.

A. (Continuing:) I told Buchhalter Sunday morning in his house about ten o'clock——

[fol. 62] Q. This was Sunday morning, the 15th of September?

A. The 15th of September.
Q. Sunday morning after the 29th of August?
A. Yes.
Q. The 29th of August was Thursday, was it?
A. Yes, sir.
Q. And the following Sunday——
A. I went to his house and told him I am going to leave for Dallas, and I told him that I was told that he would not be permitted to take possession of the property.

That Mr. Buchhalter threatened to do so with a gun, against which he, plaintiff, says he advised; and that Buchhalter's reply was to the effect that he (Rude) had nothing to do with the matter, as he had been settled with, and that Buchhalter made a forcible attempt to get possession. That witness next saw Buchhalter at the Roosevelt Hotel in Denver in bed the following Monday night, and that "his face was all tied up and beaten up."

Q. What conversation occurred at that time?
A. I told him "I told you not to take those measures, and your father is holding me responsible for you getting into trouble." He says "You haven't anything to do with it. I told my father that. You are not responsible. You had nothing to do with it, and they can't blame you for my troubles." He says "When I get to feeling better I am going out there and get a couple of rowdies and clean the other bunch out. I am not through with them." That about two days subsequently, witness again saw Buchhalter at the Roosevelt Hotel in the latter's office down stairs.
Q. What was said at that time about a sale of the mill?
A. I told him, "You go and get Morris Block, and that is the only thing left now; for you to get Morris Block, and I believe you can get a sale out of Bronstine. He is the only man that can arrange a sale now."

That Buchhalter agreed that such was the case, and Morris Block was summoned to the hotel that same evening.

Q. What was said at that conversation that ensued after Morris Block's arrival?
A. He says he has been negotiating with Binstock since [fol. 63] Saturday and he believed he had got a deal, and

that the deal was that they were to pay Buchhalter about $38,000 in cash and the balance in bonds.

That the total purchase price was to be the money invested "plus the balance of interest." "It amounts to about one hundred and twenty-eight or thirty thousand dollars. * * * It was the money invested plus the interest and the bonds that we had behind the property. That was the sale, the exact amount." That Block said that he had already seen Binstock on the preceeding Saturday respecting a probable sale to him of this property. Mr. Buchhalter thereupon said to plaintiff, "What do you think of that deal?" "I says, 'as far as I am concerned, for my share, if I was to make a sale, I wouldn't take any bonds. I would take no bonds.'" "Morris Block said, 'That is out of the question. You can't get cash. They haven't got cash. You can only get what they have got.'" "I says, 'He can do what he wants.'" "He said, 'Will you take bonds for your half?'" "No," I said, "I don't want any bonds, but I will do this. If you will give me $40,000 I will take the balance in a note from you for the balance of the amount."

Q. For the balance of $67,500?
A. I didn't discuss the other letter at all.
Q. You didn't discuss which letter?
A. The letter of $75,000.

"Morris Block said, 'It is out of the question to get that much money,' so Buchhalter said, 'If that is the situation, that Rude wants all cash, I must have $10,000 more. You should go back to Mr. Binstock and say if he should give me $10,000 more in bonds I will pay Rude all in cash for his interest.'"

That witness left for Dallas the next day, prior to which, however, "Mr. Block came in and said to us that he didn't know there was a mortgage against the property; he didn't know until Robinson advised him of the fact that there was a mortgage against the property." That the proposed sale to Binstock had not been concluded at the time of witness's departure; that negotiations were still going on; that witness left a release of the trust deed prior to his departure for Texas, but retained the note for $67,500 in his possession. That witness next heard further concerning the

[fol. 64] sale of the Paper Company property when in New York, when he received a telegram from Mr. Silverstein. This telegram is offered and received in evidence as Plaintiff's Exhibit F, and reads:

"Denver, Colorado, October 12, 1929.

I. Rude, % Joe Lifter, 110 West 34th Street, New York City, N. Y.:

Buchhalter Binstock contract signed all papers delivered to Buchhalter and placed in escrow Must have note here to accompany your request release trust deed not later than Wednesday next week to complete deposit in escrow wire answer.

Harry S. Silverstein."

The Court: Selling to Binstock?

Q. Mr. Buchhalter was selling to Binstock?
A. Yes, sir.

Mr. Shafroth: I offer this in evidence, Plaintiff's Exhibit F. If your Honor please, I will offer in evidence the original agreement between Buchhalter and Binstock. Mr. Lutz waives the identification of the instrument, as he concedes it is the exact instrument.

Q. Did you reply to that telegram of Mr. Silverstein's?
A. Yes, sir.
Q. Is that a copy of your reply?
A. Yes, sir.

Mr. Shafroth: Exhibit H is a reply to the telegram:

"Jos. Buchhalter, Roosevelt Hotel, Denver, Colo.:

Advise Silverstein note mailed care Denver National Bank wrote you.

I. Rude."

This latter telegram is offered and received in evidence as Plaintiff's Exhibit H; that plaintiff wrote the Denver National Bank a letter when sending them the note.

(At this juncture the examination of the plaintiff was suspended and Howard E. Parks, a witness called on behalf of plaintiff, took the stand.)

[fol. 65] Direct examination.

By Mr. Shafroth:

Witness, a resident of Denver, states he is Trust Officer of the Denver National Bank; that he had charge of correspondence and files of the trust department of that institution and that he had present with him in the court room the entire file involving the matter in question (being the escrow of Mr. Rude's note for $67,500, forwarded by Rude to said bank), which was identified as Plaintiff's Exhibit I. Thereupon the witness was excused.

William B. Morrison, called in behalf of the plaintiff, took the stand.

Direct examination.

By Mr. Shafroth:

Witness states that he is a resident of Denver, and Vice-Chairman of the Board of Directors of the Denver National Bank; that on or about October 16, 1929, he received a letter from I. Rude, dated October 14, 1929, inclosing a note payable to Rude, signed by Joseph Buchhalter, for $67,500, payable six months after date, and identifies said last mentioned letter as Plaintiff's Exhibit I-9. Thereupon, counsel undertook to read said letter, but permission, for the time, was refused upon objections of the defendants. Mr. Morrison thereupon stated that he had called Mr. Silverstein, attorney for Mr. Buchhalter, on the telephone and read the letter in question to Silverstein.

Whereupon the plaintiff, I. Rude, was recalled for further direct examination by Mr. Shafroth.

Witness states that he had written no letter to the Denver National Bank other than the one in question, respecting the matter of the note. Whereupon, objection to the offer of the letter was withdrawn by the defendants and the letter was offered and received in evidence and read to the court. This letter, Exhibit I-9, appears hereinafter in the appendix.

Plaintiff next introduces his Exhibit J, being a telegram from Buchhalter to I. Rude, dated October 16, 1929, reading as follows:

"Received letter Denver National stop Binstock depositing Nineteen Thousand Dollars now stop Balance up to [fol. 66] about Thirty Eight Thousand together with bonds after incorporation of Company and taking of inventory which will be November 1 stop all Silverstein can give bank now is receipt for note and statement that proceeds both cash and bonds will remain in present escrow subject to your order and will not be drawn down unless approved by you stop wire bank to turn over note upon receipt.

"Joseph Buchhalter."

It is agreed between plaintiff and defendants that plaintiff's Exhibit I-4 acknowledges receipt by The First National Bank of Denver of the note for $67,500. Said Exhibit I-4 is a letter dated October 21, 1929, to the Denver National Bank of Denver, Colorado, by The First National Bank of Denver, acknowledging receipt of said note in question and dealing with an escrow respecting the same, and providing:

"Said note is received with the understanding that it is to be turned over in pursuance of said contract (contract of sale between Binstock and Buchhalter), and to comply therewith, and upon the agreement on the part of the undersigned, that we will hold any and all proceeds deposited with us under said contract or said escrow instructions until Joseph Buchhalter and I. Rude have agreed in writing concerning disposition of said proceeds."

Plaintiff next offers Exhibit I-8, which is received without objection, which is a telegram from the Denver National Bank to I. Rude, New York City, dated October 17, 1929, and reading:

"Before delivering note enclosed your letter October fourteenth to escrow holder, we must have your instructions as follows stop I hereby authorize you to deliver Buchhalter note dated August twenty ninth nineteen twenty nine for sixty seven thousand five hundred dollars to The First National Bank of Denver Colorado as escrow holder under

terms any escrow instructions made executed and delivered pursuant to any contract of sale between Joseph Buchhalter and M. Binstock covering sale Buchhalter interest in property described in trust deed securing said note upon your taking receipt from escrow holder stating it will hold any and all proceeds deposited with it under said contract or [fol. 67] said escrow instructions until Buchhalter and myself have agreed in writing concerning disposition of said proceeds."

It was stipulated by the defense that Rude actually sent the telegram to the Denver National Bank in language above quoted, and requested by the Denver National Bank.

Whereupon WILLIAM B. MORRISON was recalled for further direct examination by Mr. Shafroth, to whom is exhibited Plaintiff's Exhibit I-5. Witness states that he replied to the said letter, and the said reply marked Exhibit I-5 is offered and received in evidence, over objection, as immaterial, offered by the defense. Witness states that he delivered the letter to the trust department of his bank (Denver National Bank) and left it with them and knows nothing about the transaction thereafter.

Whereupon plaintiff RUDE was again recalled for further direct examination by Mr. Shafroth. Witness repeats that he sent the $67,500 note to the Denver National Bank and that he returned to Dallas, Texas, from New York, where he received, on November 16, 1929, the following telegram, introduced as Plaintiff's Exhibit K, and signed by Mr. Buchhalter:

"Mill deal closed today. Can you come to Denver so we can wind up the whole thing. Some money still to be paid next week but we can settle things in meantime. How is the stock market in Dallas"

That in response to the foregoing telegram, witness proceeded to Denver, arriving there on the Monday morning following (November 18, 1929); that he saw Mr. Buchhalter

when he arrived in Denver; that they went to the First National Bank about four-thirty that afternoon.

Q. State what happened when you went to the bank.

A. Joe (Buchhalter) said we had better go and get that money, better go in and get that money. I says, "Why, it is too late. I suppose the bank is closed." "No," he says, "they are going to be open." He says, "They are going to wait for us."

That upon arrival at the bank, Buchhalter called Mr. [fol. 68] Rogers, one of the vice-presidents, to bring out the papers, and "while Mr. Rogers went back to get the papers Mr. Buchhalter says 'I want you to let me have some of that money. I have got a large bundle of securities here—so I can go out in the morning and sell it, and give you the balance due.' I said all right. I says, 'How much it is?' 'Oh,' he says, 'it is around $11,000,' and then Mr. Rogers came back and brought a bundle of papers. Mr. Buchhalter says, 'How much do I owe you, Mr. Rogers,' and he figured out it amounted to $11,615. He made out checks of $28,080, one check for eleven thousand six hundred some odd dollars, and a $16,000 check to me, to both of us, and Mr. Buchhalter countersigned it on the back and gave me the check." That thereupon Buchhalter paid the bank eleven thousand six hundred and fifteen dollars and some odd cents owed by him to the bank.

Q. What did Mr. Buchhalter say regarding the payment of the balance that was due you?

A. He would pay me the balance in the morning.

Q. In cash?

A. In cash, but would not give me a note for the balance—because I was supposed to get $40,000.

"He says it was only $28,080 in the bank. There was more money coming in in the deal, which would make the total about $34,000. 'The balance I will give you to make up the $40,000.'"

Q. Make up the $40,000 or the $67,000?

A. The $40,000 cash. That was before we got into the bank.

Q. Now, was this conversation at the bank, or before you got into the bank?

A. Before. Between walking from Mr. Silverstein's and the time Mr. Rogers brought the papers out.

Q. Just before getting into the bank?

A. Yes.

Q. What was said at the bank?

A. Between the time we went in the bank and Mr. Rogers brought out the papers this conversation was had.

Q. What was said at the bank?

[fol. 69] A. He said there was about $34,000 will be in the bank next week. There is $28,000 though. "You will get that much."

That I should let him have the money he owes to the bank and he will take up all the securities and pay me in full of the note.

Q. He would pay you the full $67,500?

A. Yes.

Q. When?

A. Next morning.

Q. What was done with the bonds?

A. The bonds were left there.

Q. Left there with the bank?

A. With the bank.

That the parties then left the bank together and were together all that evening, but that not much was said about the transaction at that time.

Q. Mr. Rude, state what Mr. Buchhalter said relative to paying you the balance due on your note.

A. He says he is going to sell $25,000 worth of bonds to a man by the name of Mr. Hurd in the morning, and in addition to that, he is going to sell some of his collateral and pay me in full.

Q. The next morning?

A. Yes, sir.

Q. Did he do that?

A. He said to Block in my presence, "I will tell you—come down stairs and I will tell you where you can sell some stuff for me that I want to pay in the morning.

That thereupon, Buchhalter and Block left witness's presence; that Buchhalter has not paid the plaintiff and has refused so to do.

Thereupon witness identifies Plaintiff's Exhibit L, being a letter written by witness to defendant Buchhalter November 4, 1929, before leaving Dallas for Denver; objection to which was made on behalf of the defense, on the ground that it was purely self-serving, incompetent, irrelevant and [fol. 70] immaterial, which objection was sustained and said Exhibit L excluded from the record, and plaintiff excepted.

Thereupon witness identifies Plaintiff's Exhibit M, and again offers Plaintiff's Exhibit L, in conjunction with Plaintiff's Exhibit M, to which objection is made by the defense. There is nothing on the face of this telegram (Exhibit M) to show that it was in reply to Exhibit L; that the testimony is incompetent, which objection was sustained, the plaintiff excepting.

Mr. Shafroth: If the court please, I think that is all at present.

MOTION TO DISMISS

Mr. Lutz: Well, I would like at this time to interpose a motion for dismissal on the merits. Certain it is that the allegations of the bill have not been established. He has not proved any lien of any kind against anything for any purpose. He has not even testified that he has a lien against any bank or elsewhere; that is his case. That is how he comes into equity.

The Court: What is he claiming?

Mr. Lutz: He is claiming a balance due on a note plus a lien on all the bonds. You certainly could not grant it on the showing made up to date.

Mr. Shafroth: It would hardly be proper to argue a motion of that kind, since we have not rested.

Mr. Lutz: I thought you said you were through except rebuttal.

The Court: Go ahead and finish your case if you are not through.

Mr. Shafroth: Mr. Rude is open for cross-examination.

Cross-examination.

By Mr. Lutz:

Witness states that he is fifty-five years of age, was born in Europe, has resided in this country thirty-eight years, or

since 1892; that he is a naturalized citizen, having taken out his papers in Denver, Colorado, of which place he was a citizen up to 1928, after which he became a citizen of Texas.

Q. Mr. Rude, I understand that you have not verified the complaint in this case. Have you read it?

[fol. 71] A. It was sent to me and I read it, yes.

Q. But you had your attorney swear to it instead of swearing to it yourself.

Mr. Shafroth: I object to that as incompetent and immaterial. The complaint shows for itself exactly how it was verified and why it was verified by the attorney.

Mr. Lutz: I am going to make him verify it now. May it please your Honor, the verification of the attorney in an equity suit in the federal court is no verification at all.

The Court: What do you want?

Mr. Lutz: I want this man to swear to the truth of the complaint in this case.

The Court: He doesn't have to.

Mr. Lutz: Well, I will ask him to and let him decline if he cares to.

Mr. Shafroth: We object.

The Court: Well, if he has some object that is not apparent to the court now——

Mr. Lutz: I have an object, your Honor. May I show you?

The Court: Yes.

Q. Do you or do you not swear to the truth of all the allegations of the complaint in this case?

(Further objection by Mr. Shafroth.)

Mr. Lutz: I am entitled to get a res adjudicata decision in this case so they can't bring another suit on some inconsistent lines.

The Court: If you will change the form of the question, I think it will be all right. You may ask whether the allegations are true, or whether he knows them.

Q. Do you know all the allegations of the complaint?

A. Yes.

Q. You have read it?

A. Yes.

Q. And they are true, are they?

[fol. 72] (Further objection by Mr. Shafroth.)

Q. You have done that, have you?
A. Done what?
Q. You have sworn to the truth of the complaint?
A. Yes, I read all the complaint too.
Q. These bonds and funds that are over there in the bank, Mr. Rude, to whom do they belong?
A. The bonds?
Q. Yes.
A. Mr. Buchhalter.
Q. They all belong to him?
A. No, I don't know that they all belong to him. They are held there as security. They belong to me.

Objection by Mr. Shafroth.

The Court: Ask him about the facts.

Q. Do you claim to own any of the funds or bonds in the First National Bank?

Objected to by Mr. Shafroth, as incompetent, irrelevant and immaterial. Objection overruled. No exception taken.

Q. Do you claim to own any of the funds or any of the bonds now in escrow in the First National Bank and now in suit?
A. I own them all. I claim them as security of my note.

Witness states that the purchase of the property of the Colorado Pulp & Paper Company by witness and Mr. Bronstine at the Master's sale was confirmed by the court, but that such sale was shortly thereafter taken to the Supreme Court of the State of Colorado, and is now undetermined and pending in that court. Such controversy involves the validity of the sale, whereby witness and Bronstine acquired this property. Witness states that he had an oral agreement with his associate, Mr. Bronstine, that Mr. Buchhalter should not have charge of the management, that *that* he, the witness, should control the management. Up until the 29th of August, 1929, from the time witness acquired the property under Master's sale, the full one-half was in his name, but that he was in reality and in fact a trustee for Mr. Buchhalter for one-half of that half, or a quarter of the whole; that subsequently, and until on or

[fol. 73] about August 16, 1929, Mr. Buchhalter was without written evidence of his (Buchhalter's) interest in the property; that the property was acquired under the sale of May 14, 1929, and for a couple of months witness was Buchhalter's trustee for a one-fourth interest, without Buchhalter having any written evidence thereof; that each trusted the other fully and possessed absolute confidence one in the *the* other; that immediately after Bronstine and the witness acquired this property, witness undertook to sell (his half) to Bronstine and associates; that these efforts on the part of witness commenced in June and continued until the latter part of August; that there were quite a number of such attempts to so sell the property to Bronstine and associates, but that they had not met with success.

Q. Conditions got very acrimonious between you and Mr. Bronstine, didn't they?

A. Not very much.

Q. Each was threatening the other with litigation, wasn't he?

A. No, sir, he was not.

Q. You didn't hear that you were going to be threatened with a partition suit or a receiver's suit?

A. Not prior to August 29th.

Witness denies that the reason he wanted to get out on August 29th was due to a prospective suit with Bronstine.

Q. What was the reason you got out?

A. Because Mr. Buchhalter said if the title was in his name he would make a sale to Mr. Bronstine.

Witness states that he had the idea to sell (out his interest in this property) right along from the time possession was gotten from the receiver.

Q. Well, I know, but to transfer to Mr. Buchhalter. When did the first notion seize you to do that?

A. Oh, about a week or two prior to August 29th.

Witness recalls having gone to the office of Mr. Silverstein along with Mr. Buchhalter on the morning of August 29th and there having a conversation respecting the proposed conveyance from Rude to Buchhalter.

[fol. 74] Q. And the proposed issuance of a note to you or from you to him, or vice versa?

A. Yes, sir. The conversation was that Buchhalter and I had agreed that I am going to take a note for the actual amount that I have got invested in the property on August 29th. We had previous conversations at other times.

That witness with Buchhalter was in Silverstein's office and presence for a couple of hours on August 29th, and that "we figured up what was coming to me, what I had invested." That $61,000 was the figure mentioned. "We had got first before we came up to the office what the amount would be approximately so all we had to do was to figure up the exact amount or about the amount."

Q. Isn't it true that you discussed a mortgage for a hundred and fifty and for a hundred and thirty-five and for a hundred and twenty-five?

A. Not that day.

Q. When did you?

A. Several days previous.

Q. What was that discussion?

A. The discussion was that Mr. Buchhalter wanted me to take a mortgage for his and my interest both.

Q. What was the purpose of issuing that mortgage?

A. Two purposes. One purpose is to let me out of the deal and the second purpose is to make Bronstine buy out half.

Q. To make him buy?

A. Yes.

Q. The fact is you had entered into a sort of campaign against Bronstine?

A. You might call it that. Mr. Buchhalter was the instigator of it.

Q. You thought you would adopt methods to make Bronstine buy you out?

A. I didn't believe in it.

Q. You did it.

A. I did it at his request.

Q. Isn't it a fact that you put this mortgage on there just for the sole purpose of thinking you were going to embarrass Mr. Bronstine?

[fol. 75] A. No, I didn't think it.

Q. But you did it because you were told that would be a good thing?

A. No, because I got tired of Mr. Buchhalter harassing me and worrying me about what I should do with Mr. Bronstine.

Witness denies that the note was given to him for purely exhibition purposes or to make it appear to Mr. Bronstine that his transaction with Mr. Buchhalter was a real sale.

Respecting the $75,000 previously referred to, witness states that Mr. Buchhalter told him he would give him a good profit; that he would sell at a good profit. "We finally agreed what my share of the profit would be." Witness admits that he had been trying for a long time and had made many efforts to sell the mill; states that Bronstine at one time had made a better proposition than had been effected by Mr. Buchhalter.

Q. Didn't Mr. Buchhalter in the presence of Mr. Silverstein and Mr. Rosner, and possibly Mr. Blount, say to you that you were the only man in the world to whom he would deliver a note for $67,500 that was not real?

A. He said he would not deliver a note for $67,500 on such short terms but to me. To the terms being short, my answer was that if the note came due he would not worry I would foreclose. I would extend it.

That such was said in the presence of Mr. Silverstein. On being asked again to give the entire conversation the morning of August 29, 1929, with Mr. Buchhalter in Mr. Silverstein's presence in the latter's office, witness stated:

A. We came in—Mr. Buchhalter and I came into the office, and I told Mr. Silverstein that we had agreed that since the other deal was not a legitimate one of getting a mortgage for the whole interest——

Q. Had you mentioned that illegitimate deal to Mr. Silverstein before?

A. Yes, sir.

Q. When?

A. The morning of August 29th. * * * I used the words of Mr. Rosenbaum. I think he said not with clean hands.

(Witness, continuing:) "I said we had agreed he should [fol. 76] take a mortgage for the actual amount I had in-

vested in the property and we figured it out what the amount was."

Q. So you claim it was a valid deal at all times, this particular deal?

A. Yes, sir.

Q. And this note was a valid note from the time given, up until now?

A. Yes, sir.

Q. That is your contention?

A. Yes, sir.

Witness states he is not sure whether he went to Mr. Rosenbaum's office this same morning (August 29, 1929), but does not think that he did. He fixes the time as after the occasion when Mr. Buchhalter got in trouble at the mill, which was on the Monday morning following August 29th, and then denies that he was at Mr. Rosenbaum's office on August 29th. He asserts positively that such was not the date; that Rosenbaum advised that the deal testified to by witness would be all right, and states that Rosenbaum said nothing with respect to drawing the papers. Rosenbaum was not asked to draw the papers; that Rosenbaum was requested to look up the law as to whether a mortgagee would have to be a party to a partition suit, but that such did not take place on August 29th, but a day or two previous to that. Of this the witness is sure.

Q. While you and Mr. Bronstine were interested in this property you wrote him a number of letters, didn't you?

A. Wrote who; Mr. Bronstine?

Q. Mr. Bronstine.

A. I particularly remember one; yes I remember two.

Q. You had a number of conversations with him?

A. Yes.

Q. Many of them to the effect that you complained the way he was handling matters, etc.?

A. Yes, sir.

Q. I show you Defendants' Exhibit 1 and ask you to state what that is, if you know.

Mr. Shafroth: I won't object to the offer of that, Mr. Lutz.

Q. This is your signature, isn't is, Mr. Rude?

A. Yes, sir.

Q. You signed and sent that letter to Mr. Max Bronstine?
[fol. 77] A. Yes, sir.
Q. August 29, 1929?
A. Yes, sir.

Mr. Lutz: I desire to offer in evidence, if your Honor please, Defendants' Exhibit No. 1 which is a letter dated August 29, 1929, addressed to Mr. Bronstine, Max Bronstine, and consists of a long list of grievances that Mr. Rude professed to entertain against Mr. Bronstine. This is in line of my statement of the campaign that had been entered into by these parties against Mr. Bronstine. I wish to show the colorability and the fictitiousness of the transaction.

Mr. Shafroth: I object to that on the ground it is immaterial and irrelevant in this case.

(Argument by counsel for the respective parties.)

The Court: Objection overruled.
Mr. Shafroth: Exception.

Mr. Lutz: I will read this letter to your Honor. It is part of the campaign, as I said. The same day now——
The Court: I will read it.

Q. Mr. Rude, I hand you Defendants' Exhibit No. 2 and ask you to state what that is if you know.

Mr. Shafroth: Now, if the court please——

Q. Is that your signature, Mr. Rude? Did you sign that letter?

Mr. Shafroth: If the court please, I want to renew—well, I will let you offer it first.

Mr. Lutz: I will now offer, if your Honor please, letter under date of August 30, 1929, addressed to Mr. Max Bronstine and signed by I. Rude, still bickering.

Mr. Shafroth: If the court please, I want to object, pertaining to some differences that have arisen between Bronstine and Rude. I want to renew my objection to the introduction of that on the ground of irrelevancy, incompetency and immateriality. Also I want to call your Honor's attention to the fact that this dispute that is before the court at the present time is a dispute over certain bonds

that are held by the bank. Mr. Lutz admits that his client, Mr. Buchhalter, was trying to trim Mr. Bronstine by mak- [fol. 78] ing him buy him out at a high price. He contends that Mr. Rude was doing the same thing. It is our contention that that has no relevancy to any controversy between Mr. Buchhalter and Mr. Rude as to the disposition of the bonds which are in the First National Bank on a sale to Mr. Binstock.

(Further argument by counsel for the respective parties.)

The Court: I will admit it subject to objection later. If it doesn't prove some scheme it may go out.

Mr. Shafroth: I will save an exception, and ask the privilege to take it up later.

Q. Do you know the signature of Mr. Bronstine?

A. Yes, sir.

Q. You can't say whether you received Defendants' Exhibit 4 or not?

A. No, I was not in the city at that time.

Q. You can tell by looking at it whether you ever saw it before or not?

A. I don't remember receiving that letter.

Q. You do not?

A. No, sir.

Q. Mr. Rude, as a matter of fact, the only grievance you have against Mr. Buchhalter is his refusal to buy your share of the bonds; isn't that it?

A. The only complaint I have got against Mr. Buchhalter, that he has tricked me.

Q. Did you ever tell Mr. Buchhalter that you wanted him to buy these bonds?

A. Mr. Buchhalter agreed to buy the bonds.

Q. When did he agree?

A. He agreed on the night of September 3rd or 4th.

Q. Then they were your bonds?

A. They were my bonds. They were the only bonds in question. I told Mr. Buchhalter before that, when the deal was approached by Mr. Block, that I will not take any bonds in payment of my note.

Witness denies that since the closing of the deal in question he had asked Mr. Buchhalter to buy any of these bonds

and says that the matter did not come up, and asserts that on or about January 19, 1930, he stated to Mr. Rosner his grievance against Mr. Buchhalter was that the latter did [fol. 79] not "go through with his contract of giving cash instead of bonds."

Q. And didn't you say at the same time and place, you were going to teach Mr. Buchhalter a lesson if he didn't buy these bonds?

A. I said to Mr. Rosner that Mr. Buchhalter had done a long string of crooked deals and he met his match at this time.

Q. You said you were going to break him, didn't you?

A. Yes, sir.

Witness denies that he threatened Buchhalter with adverse publicity if the latter did not come to a "satisfactory settlement."

Q. You didn't write Mrs. Buchhalter something along that line?

A. I said I would like to see the publicity, but I didn't want to be the cause of it.

Witness denies that he threatened Buchhalter with "first page stuff" in The Denver Post; admits that he had paid a visit to Mr. Bonfils, publisher of that paper, but instead of asking Mr. Bonfils to give or arrange publicity for Buchhalter, on the contrary, he requested Bonfils to say nothing about it. Admits that he had seen Mr. Bonfils since his arrival in Denver for the trial.

Q. You knew Mr. Buchhalter had a libel suit against the Post, didn't you? You knew all about that.

Objection by Mr. Shafroth. Objection sustained by the court. Exception by Mr. Lutz.

Witness identifies and admits reading Defendants' Exhibit 5, which is offered and received in evidence. It is a letter under date of December 7, 1929, addressed to Mrs. Buchhalter and signed by the plaintiff.

Plaintiff objects to the reception of the letter in evidence, on the ground that the further correspondence between Mrs. Buchhalter and the plaintiff has not been offered by the defense.

Witness states that his dispute with Mr. Buchhalter first arose the second day after he returned to Denver, which [fol. 80] he fixed as "Tuesday night of the Monday that I received that telegram after the money was taken out of the bank." Upon being asked to give the day and month, he states it was November 4th or 5th; that he cannot remember definitely; that the agreement was to get all the cash the next morning after he arrived here.

Q. You were to get $67,500 cash?
A. Yes.
Q. Why didn't you discuss the other $7500?
A. No, because that was left to be adjusted as to the attorneys' fees between us, and if there were any profits——
Q. Well, you knew there were no profits, didn't you?
A. I didn't expect any profits, but I paid out $2500 attorneys' fees. "I was to get the money that I *l*aid out for attorneys' fees in addition."
Q. So you were to get, then, about $75,000 out of a total of $120,000, yours to be cash, and his bonds?
A. I was to be getting about $70,000.
Q. Cash?
A. Yes, sir.

In respect to the bonds, witness states they have no market value; that he never tried to sell them, but that an offer was made to him by a Mr. Karsh, the lat-er stating that he would give seventy-five cents on the dollar for the bonds, to which witness states he replied, "I haven't any bonds for sale."

Witness denies that when in the First National Bank with Buchhalter, he asked Mr. Rogers, the vice-president of that institution, whether the bonds could remain there for a day or two without further escrow charges until he and Buchhalter had figured out their respective interests. He states that nothing of that kind was said to Mr. Rogers.

Q. What did you say in his presence?
A. He says, "I am leaving $100.00 for escrow fee which will be adjusted later," or something to that effect. When he took out the twenty-eight thousand eighty he said he was deducting the fee to be adjusted later.
[fol. 81] Q. Did Mr. Buchhalter agree to give you the money or cash in the bank?

A. The promise was made not with Mr. Rogers. Mr. Rogers went back to get the papers.

Q. Then you were just there alone?

A. He and I.

Q. How long was Mr. Rogers gone?

A. I should judge about five minutes. The agreement started at the time we left Mr. Silverstein's office until we get the money. He said "I will not give you any note. If you will lend me $11,000 or a little over I owe the bank, I will take up the securities and get you the next morning all the money I owe you."

Q. Mr. Rude, weren't you there and didn't you see that he (Buchhalter) had only 200 shares of Cities Service stock?

A. He never showed me what he had. He took the bunch and walked away with it. I didn't know whether it was 200 or 2000 shares.

"I saw he had the papers, except the Manufacturers Trust Company. He gave that. That was my stock."

Q. Isn't it a fact that you went that evening to the Roosevelt Hotel and you personally summoned Morris Block to figure up your and Mr. Buchhalter's interest in the bonds?

A. A question came up after we found that the bill of Silverstein's was about five times as much as Buchhalter told me it would be. Then he said that he feels I should stand part of the attorney's fees.

Q. But you didn't call Mr. Block over to figure up your respective interests in the bonds?

A. No, not any bonds. The respective interest about the attorney's fees, how much I paid out and how much he paid in.

Q. Just the attorney's fees?

A. Just the adjustments.

Witness admits that the day following the drawing of the funds out of the First National Bank, that he and Buchhalter went to Mr. Silverstein's office and the latter was given a check for $5,000 on account of attorneys' fees.

Q. Mr. Rude, would you recognize Mr. Block's figures if I were to show them to you?

[fol. 82] A. I didn't see him when he was figuring. We was arguing back and forth.

Q. So he didn't then, figure for at least two or three hours in your presence and in Mr. Buchhalter's presence, going over memorandums and cancelled checks and all that?

A. We didn't agree on the figures. There was quite a dispute. We left it at that. We didn't agree to anything.

Witness states Mr. Block negotiated the Binstock deal. Upon being asked whether he paid Mr. Block any commission, he states, "I paid him."

Q. Why did you pay a commission? You had your note.

A. Well——

Q. Answer that question.

A. Because I felt that Mr. Block was entitled to some money.

Q. Did you agree to pay him the commission?

A. No, sir, that was voluntary on my part.

Q. Just a gift to him?

A. Yes, sir.

Q. Kindness?

A. Not a kindness at all. I felt it was due him.

Q. Isn't it a fact that you argued with him at least two hours over the amount of his commission?

A. No, sir. I argued to him that—I was talking to Mr. Buchhalter, not for myself.

Q. Didn't he present you and Mr. Buchhalter a joint bill of $2500.00?

A. He didn't send no bill at all.

Q. And you succeeded in cutting him down to $500.00?

A. I said to him that since he hasn't said he wants a commission I feel from an honorable standpoint that he should get $500.00, and after the Supreme Court has decided to give money paid for the coupons which is now in the Supreme Court I would see he would get additional money because he was entitled to it.

Q. I show you Defendants' Exhibit No. 6, and ask you if you can state what that is.

A. I have seen it.

Q. You never saw it?

A. I saw him figure, but I didn't look into it to verify it.

[fol. 83] Q. Isn't it a fact that you were given an exact copy of this?

A. Yes, he made a copy. I believe the copy was made in Mr. Rosenbaum's office.

Q. But you have seen a copy of it?

A. Yes, I have seen a copy, but I don't know what the figures are. I know there was argument going on back and forth.

Q. Didn't you give Mr. Block these figures?

A. Some figures he wanted it. I wanted him to put down $14,000.00 which he didn't put down.

Q. You didn't agree to these figures?

A. No, sir. Mr. Buchhalter thought since the fee of Mr. Silverstein is a robbing amount, as he called it, being partners for so many years, that I should participate of my free good will in the lawyer fee.

Q. Why figure to him? You had your note.

A. I wanted to figure out how much I paid on lawyers' fees. I said about the same amount. I paid attorneys' fees too.

The witness identifies Defendants' Exhibit 7, which is offered and received in evidence without objection.

The witness admits that he was in Denver in March, 1930, on an occasion when Mr. Buchhalter was absent from the city.

Q. Did you or did you not while here in March last, go over to the Roosevelt Hotel and try to rifle his (Buchhalter's) desk.

Objection by plaintiff sustained. Exception taken by defense.

Witness states that he delivered the release of the trust deed in question, to Mr. Silverstein four or five days after its execution. Later corrects this testimony to place it about September 17th or 18th; that the release was given in case of the making of a sale, but that witness retained the note.

Q. You said you were sending it to Dallas, but would return it immediately?

A. I would return it whenever the note was needed.

Q. You executed another release, didn't you, also, later?

A. Not later. The same night, everything.

[fol. 84] Witness identifies and admits the execution of Defendants' Exhibit 9, which is a release of the trust deed in question.

Q. You signed over and above the recital, "the indebtedness secured by the above mentioned deed of trust having been fully paid?"

A. I left it in escrow to be delivered.

Defendants' Exhibit 9 is offered and received in evidence without objection.

Q. You had many talks with Mr. Silverstein about your disputes with Mr. Buchhalter?

A. Not many talks. Just one.

Q. When was that?

A. I should imagine it was about Wednesday night.

Q. When, the date?

A. After that Monday that I arrived here.

Q. That was all?

A. Yes, that is all I had with reference to this.

Q. Did you ever tell Mr. Silverstein anything in relation to your dispute with Mr. Buchhalter that you were relying on this note?

A. I had a long conversation with him. I don't know what particular incidents. We were talking about two hours.

Q. Did you tell him Mr. Buchhalter wouldn't pay the note?

A. That he wouldn't pay the note as we agreed in the bank; that he backed out.

Admits a conversation with Mr. Bosner in January, 1930, one Sunday morning; that the Buchhalter matter was not discussed as much as was the attorneys' fees; does not remember whether the note was discussed.

Q. Didn't you tell Mr. Rosner on the occasion of which I have reference that you knew this note was bunk and hokum, but you were going to try to make it stick?

A. I don't use that tone of language.

Q. I was using it because I understood it was your language.

A. That was not my language.

Q. Well, what did you say about it?

A. I never said anything of the kind. The most discus-[fol. 85] sion was as to the fee bill of Mr. Silverstein. The rest was really a side issue.

Witness states that he did not try to get Mr. Rosner to intercede with Buchhalter to buy his share of the bonds; that he merely said to Rosner that he and Buchhalter could not come to a settlement, and that he did not claim any share of the bonds.

. And you say that Mr. Silverstein or any of the other at[illegible]neys mentioned advised you not to transfer or not to tak[illegible] this note because it would be unethical?

. . No, sir, I didn't accept that original note of $130,000.

Q. Tell us more about the $130,000. What was that?

. . You heard me say that Mr. Buchhalter wanted — in case of a partition, as he said, he would be back and not ha[illegible] the cash money to put in his share. My understanding was, or, rather, I was told by Mr. Rosenbaum, that get[illegible]ng money in the amount of excess what was due me, if i[illegible] was contested I wouldn't be coming in with clean hands in court.

Q. So you wanted your hands to be clean?

A. Well, my hands may be clean, my heart may be dirty, but I am not that kind.

Q. Mr. Rude, isn't it a fact that there was discussion back and forth as to whether you would give the note and mort[illegible]gage, or whether Mr. Buchhalter would give the note and mortgage, and finally it was agreed you would convey to him and he give it because you were a merchant in Dallas and didn't want to report to Dun and Bradstreet?

A. No, sir, I didn't.

Witness states that nothing like that was discussed; states that he never told Mr. Silverstein that he, the plaintiff, claimed a lien on the bonds in the bank ahead of Mr. Silverstein's lien; admits that after the evening that Mr. Block did the figuring (November 19, 1929), he called up his attorney, Charles Rosenbaum, and delivered to the latter a set of his own figures. "I gave him some figures what is due me, and I asked him to get Buchhalter. I couldn't get Buchhalter to get a settlement out of him."

Q. Well, why did you figure? You had your note.

A. I said Buchhalter disputed he took the money from [fol. 86] me for the purpose of getting cash. * * * And I gave him the figures to get what Buchhalter owed me.

Q. You figured up to something like 86,000, didn't you?

Objection by plaintiff; sustained by the court.

Q. Have you given the entire conversation, Mr. Rude, that took place at the bank with Mr. Buchhalter when you were there with Mr. Rogers?

A. The entire conversation?

Q. The whole conversation?

A. I gave the main points.

Q. Give the whole conversation.

A. I don't remember every word. I have given the gist of it.

Q. I know, but this is a $67,000 transaction.

The Court: Have you given all that you remember?

A. All that I remember, yes, sir.

Redirect examination.

By Mr. Shafroth:

The witness is again shown Plaintiff's Exhibit- L and M and is asked whether he ever received any other reply to those exhibits.

(Objection to which was made by the defense and sustained by the court.)

Q. Did you receive any other telegram after November 4th, shortly after November 4th, than Exhibit M?

Mr. Lutz: We object to that as too indefinite.

The Court: Objection overruled.

A. I did not. That is the only telegram I received.

Subsequently, Exhibit M was again offered in evidence and admitted by the court, without objection.

Respecting the $5,000 check delivered to Mr. Silverstein, inquired about on cross-examination, witness states that the same was made out and given to Mr. Buchhalter and that it represented a loan to Mr. Buchhalter; that the original release of the $67,500 trust deed was given four or five days

after it is dated because the witness was leaving the city, and it was left, at the request of Mr. Block and Mr. Buch- [fol. 87] halter, "so they can close the deal and sell the property to Mr. Binstock during my absence"; that a second release was also executed later, at the request of the attorneys. Witness does not remember the time of giving the second release.

Q. Now, Mr. Rude, Mr. Lutz asked you concerning the conversation you had with Mr. Silverstein a day or two following, or possibly on the same day that the money was drawn down from the bank.

A. It was two days later.

Q. Two days later?

A. Yes, sir.

Q. Did you in that conversation state to Mr. Silverstein what the arrangement was between you and Buchhalter at the bank?

A. Yes, sir. Mr. Rosenbaum was present too.

Being interrogated respecting the item of $14,000 which Mr. Block refused to put down, he said, "I told Mr. Buchhalter that if he wants me to participate in the fees of Mr. Silverstain, that he should put back the $14,000 that he had made a- profit on the pulp mill claims, and that I would put back the $3,000 that I made in 1926," that the $92,000 in bonds still remains in escrow in the First National Bank and that witness has never agreed or made request in writing with Mr. Buchhalter for the release of the bonds from the bank.

Recross-examination.

By Mr. Lutz:

Q. Mr. Rude, you said you loaned Mr. Buchhalter $5,000?

A. Yes, sir.

Q. To pay attorneys' fees with?

A. Yes, sir.

Q. Did you take his note for that?

A. No, sir.

Q. No evidence of indebtedness at all?

A. No, sir.

Witness further states that he wrote the check to Mr. Buchhalter; denies that Mr. Silverstein asked why it had not been made direct to his firm. When asked whether or not there was not written upon the check, in his presence, and by his consent, that it was for attorneys' fees, witness states that he didn't see what was written on the check, [fol. 88] and upon demand being made of the witness for production of the check, the same is produced and offered and received in evidence as defendants' Exhibit 11. Witness states that he has never asked Mr. Buchhalter to return this $5,000 to him; that he has never spoken to Mr. Buchhalter since; that he does not know the date of this last interview. Corrects his testimony, that he met Buchhalter once thereafter in a store, but that nothing was discussed.

Defendants' Exhibit 11 is called to the attention of the witness and he is asked to observe that there is written thereon: "Paid to Blount, Silverstein & Rosner Attorneys' fees for Rude & Buchhalter." This exhibit was admitted over the objection and exception of the plaintiff.

Witness states that he never wrote to Mr. Buchhalter demanding payment of this $5,000 and has never made any demand of any kind upon him for it; that he never had any communication with Buchhalter after that.

Mr. Shafroth: That is all, Mr. Rude. We rest, if the court please.

Renewal of Motion to Dismiss

Mr. Lutz: Well, I now renew the motion, may it please the court, for the dismissal of the case upon the merits. They have not established jurisdiction. They have not established any lien of any kind. They have not made a prima facie case. They have not even shown the indebtedness. That shows the position of the case as it now stands before the court.

Ruling on motion deferred by court.

Messrs. Grant, Ellis, Shafroth & Toll withdraw as counsel for plaintiff, and an adjournment of trial taken.

Trial resumed Thursday, September 5, 1930.

Entry of appearance of Ernest Morris, Esquire, of Denver, Colorado, as counsel for plaintiff, I. Rude.

Mr. Morris: May it please your Honor, I desire to show by Mrs. Isham, who is a resident of Brighton, Colorado, that she was present at a trial that was had in Adams County, in which the defendant Buchhalter was duly sworn to testify the whole truth, and at which time he stated under oath that he had bought out Mr. Rude; that Rude [fol. 89] had no more interest in the mill as an owner, and that he was the owner of the paper mill. That is one portion of the evidence I desire to show.

Objected to by Mr. Lutz, as being purely impeaching testimony, without materiality and not constituting any part of the main case.

Further colloquy between court and counsel.

Mr. Morris stated that he had other witnesses, to-wit, one Charles B. Myers, who had had a conversation with defendant Buchhalter, in which Buchhalter undertook to tell him that he had bought out Mr. Rude's interest in the mill; that Rude was out of it, and that he was the owner of Mr. Rude's interest.

Objection by Mr. Lutz to such testimony sustained by the Court, and exception by Mr. Morris.

Mr. Morris: I will recall Mr. Rude.

Mr. Lutz: May we know for what purpose Mr. Rude is to be recalled at this time.

Mr. Morris: The question as to the bonds being held as security.

Further colloquy between Court and counsel.

Mr. Lutz: I would like to take an exception to the testimony because it is very obviously being taken to escape the motion to dismiss. It is not new testimony. It is something that was known at all times, and on the former trial the plaintiff had counsel equally as competent as the present counsel, and I think under those circumstances they had adduced nothing which should induce the court to admit anything of the sort at this time or any other time.

The Court: Objection overruled.

Mr. Lutz: Exception.

Thereupon the plaintiff, I. RUDE, was recalled as a witness in his own behalf and testified as follows:

Direct examination.

By Mr. Morris:

That he objected that he was only getting sixteen thou- [fol. 90] sand and some odd dollars; that Buchhalter "said that he was going to leave all the bonds in the bank to secure me of getting all the cash to me in addition to the $16,335."

Q. State whether or not there was anything said by him to the effect that you should not worry about getting your money.

Mr. Lutz: That is leading, your Honor, and I object to it.

The Court: I will suspend the examination right now unless you can conform to the ruling of the Court. He may state any conversation, and that is all that is necessary.

Q. State whether or not anything else was said that you now recollect, Mr. Rude, that you have not already testified to.

Mr. Lutz: Well, I want to object to that because it showed that the last question has put it in the witness' mind.

A. Mr. Buchhalter told me—to my objection, that I did not want such a small amount of money, he says, "I am leaving the bonds all in the bank to secure you that I will pay you all the cash. Until then the bonds will stay here."

Mr. Morris: Now, will your Honor permit me to interrogate the witness as to whether he knew at the time of the trial, concerning the testimony that I have offered here by other witnesses?

The Court: No.

Mr. Morris: Well then, I would like, your Honor, to make the record complete, to offer to show by this witness that the evidence which has been stated by counsel would be adduced by Mrs. Isham of Brighton and also by Mr. Charles B. Myers, corroborated by Mrs. Charles B. Myers, to the effect that Buchhalter in the first instance, to Mrs. Isham stated under oath that he had bought out Mr. Rude; that he was the sole owner of half of the mill, and also the statements that Buchhalter made to Mr. and Mrs. Myers to the same

effect, were unknown to Mr. Rude or his counsel at the time this case was being heard and the testimony taken. It was not discovered until recently.

Mr. Lutz: All of which is objected to as incompetent, irrelevant and immaterial.

[fol. 91] The Court: Objection sustained.

Mr. Morris: We except.

Cross-examination.

By Mr. Lutz:

Q. Mr. Rude, when did you remember first about this promise of Mr. Buchhalter's to leave all the bonds in the bank for security?

A. When my attention was called to the abstract, that the testimony was not in there.

Q. Who called your attention?

A. My attorney.

Q. Mr. Morris?

A. I had the testimony myself first.

Q. Did Mr. Morris suggest to you that you had omitted something?

A. No, I suggested to him. I took the testimony with me. I had also an extra copy. I called his attention that part was not in.

Q. You called his attention?

A. Yes.

Q. Did you call his attention?

A. I called his attention, and then he looked it up, and then I compared it, and it was not there.

Q. He didn't look it up?

A. No, sir, at least he didn't tell me.

Q. Don't you remember when you were on the stand the last time you were asked if you had related the entire conversation that took place at the bank?

A. That was all I remembered at the time, and I thought I did give it.

Q. You were given several chances, were you not, to give that entire conversation?

A. I might have forgotten it.

Q. Well, did you?

A. I thought it was in it.

Q. Are you now prepared to say that that agreement was made and that you forgot it?

A. I didn't forget it, but I thought it was in it. I might not have mentioned it, but I couldn't think of everything at the time of the testimony.

[fol. 92] Mr. Lutz: I move that the testimony be stricken. It is so indefinite and uncertain. It certainly shows he knew all about it, if true, and I now move to strike his testimony, all of it.

The Court: Denied.

Mr. Lutz: Note an exception.

Witness states that he retained Mr. Morris as his counsel after the prior court recess, on or about the 18th or 19th of July, 1930; that he first discussed what counsel called "this grave omission" with Mr. Morris upon his return from Dallas, which was at this time (the time of trial).

Q. So you had no further discussion with Mr. Morris, no prior discussion?

A. He didn't have the abstract ready at that -ime.

Q. Didn't have the abstract ready?

A. Just a couple of hours before I left, the abstract was handed to me.

Q. Do you mean the transcript?

A. Yes.

Witness repeats that he had no further discussion with Mr. Morris and knows nothing of representations made to the Court on September 17, 1930, by Mr. Morris, to the effect that the latter desired to put on further testimony. Witness admits that he had a copy of the transcript of his preceding testimony for approximately two months.

Q. And it occurred to you there was something else?

A. It didn't occur to me. I saw it was missing.

Q. When did you notice it?

A. On the train when I had the transcript.

Q. Didn't you communicate with Mr. Morris after you read it that there was something missing.

A. I didn't know it was material.

Q. On the train, then, that was in July last that you first discovered this omission?

A. Yes sir.

Q. Can you tell what portion of the conversation, whether it is practically the first or the middle or the last, that this agreement was the bonds should remain there?

A. The last.

[fol. 93] Q. The very last thing that was said?

A. Yes.

Q. How long were the bonds to remain?

A. Until I get all the money.

Q. No matter how long that might be?

A. He promised he would give it to me the next day.

Q. But they were to remain there until you got the money, regardless of how long?

A. He told me the next morning he couldn't get it, but he says, "What you worrying about? The bonds are there and I can't get them until you get paid."

Q. Were you to have them in just until the next day?

A. That was the first promise he made, that I was to get the cash the next morning. Then he told me the next morning he couldn't give them to me, that he was busy in court.

Again asked how long the bonds were to remain in the bank, the witness answered, "Until the next morning, until he gives me the money."

Q. So they were just to be security until he gave you the money?

A. No, just until he gives me the money.

Q. How long was that to be?

A. He said until the next morning. I took it for granted he means the next morning I will get the money.

Mr. Lutz: That is all.

Mr. Morris: That is all, Mr. Rude.

Mr. Lutz: Do you rest again?

Mr. Morris: I have never rested before. I think that is all, but I would like to state at this time, in response to counsel's question to the witness, that when I made the statement in court with reference to the setting of this case, that we would have additional testimony, that I had in mind particularly the testimony of Mrs. Isham and Mr. Charles B. Myers. I think that is all at this time.

Further examination by Mr. Lutz:

Q. Was anybody present? Was Mr. Rogers there when you had this agreement.

A. No, sir.
[fol. 94] Q. Just you and Mr. Buchhalter?
A. Yes, sir. Mr. Rogers was not there.

RENEWAL OF MOTION TO DISMISS

Mr. Lutz: Now, your Honor, for the third time we move to dismiss the case on the ground that the prima facia case has not been established, that equities have not been shown, that not even any personal indebtedness from Buchhalter to Rude has been shown. So far as the other defendants are concerned, their names have not even been mentioned. Of course, the case should be dismissed as to them. I add the further motion that this plaintiff is not in this court with clean hands, as is apparent from the testimony of his own, to which I shall refer, whereby he admitted that he and Buchhalter had entered into a campaign against Bronstine, a former associate of Mr. Rude, with respect to the very subject matter of this case * * * that equity does not grant or afford relief to such a plaintiff; that no lien has been established, and, with respect to the last testimony, the agreement that was amended, that, of course, was wholly inadequate and was not founded upon any consideration at all.

After an extended colloquy between court and counsel:

Mr. Lutz: If your Honor please, I would rather proceed on the merits. I think we can determine it very quickly that way. I wish to say first this is unquestionably a suit on a promissory note. The fifth paragraph, page three——
The Court: Well, put on your testimony.

DAVID ROSNER, called and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he is an attorney at law, residing in Denver, Colorado, a member of the firm of Blount, Silver-

stein & Rosner, and is one of the defendants in this case. That he knows the plaintiff Rude and the defendant Buchhalter; that he has known the latter for eight of nine years last past, and Mr. Rude for the last few years; that up until August, 1929, the firm of which witness is a member, were attorneys for Messrs. Rude and Buchhalter in a number of matters, particularly in the case known as the Myers Pulp [fol. 95] Case, which arose in the District Court of Adams County, Colorado. That the witness had some personal knowledge of those matters; that witness has been present in court and heard all of Mr. Rude's testimony and is somewhat familiar with the pleadings in the case; that he knows about the execution of $67,500 promissory note in suit, which bore date August 29, 1929, and also knows about the contemporaneous execution of a deed and mortgage between Messrs. Rude and Buchhalter; that witness was present when these instruments were drawn; that he heard the discussion and conversation of the parties respecting the same.

Mr. Morris: Now, just a minute. We object to this witness testifying, for the first reason because he was attorney in the transaction, as he has already testified, for the plaintiff in this case, and cannot give evidence of the character that he is seeking to give, which would be in violation of a confidential relationship existing between him and the plaintiff in this case. We object to the evidence that is sought to be elicited, for the second reason that it is sought here to adduce evidence in contradiction to the terms of a written instrument, namely, the note that has been mentioned, which cannot be varied or altered by parole; and for the further reason that the negotiations with reference to the execution of the note were merged in the note and in the deed of trust itself.

Mr. Lutz: So far as the witness' testimony is concerned, he has been made a defendant in the case, and has a right to testify to everything he knows about it. The law is universal on that subject. His mouth cannot be closed. It is charged in the bill that he and his co-defendants and partners know all the things alleged in the bill, and now we are disputing it.

After further colloquy between court and counsel, the objection made by Mr. Morris was overruled.

Mr. Morris: Now, may it please your Honor, I desire to except, and if they are seeking to vary or contradict the terms of the note, I would like to be heard, and heard fully upon that fact.

The Court: Proceed.

Witness (resuming) states that his first contact with the note and mortgage in question was on the evening of Au- [fol. 96] gust 28, 1929; that at about 8:30 P. M. of that day he received a telephone call at his home, in which he was asked by Mr. Rude to come down-town to the Roosevelt Hotel to the office of Mr. Buchhalter, which witness did. That upon arriving there, he found Mr. Rude and Mr. Buchhalter present, and that Mr. Rude said that he wanted to give a mortgage——

Mr. Morris: Just a minute. We object to that as incompetent, irrelevant and immaterial, and as testimony sought to be adduced to contradict or vary the terms of a written instrument.

The Court directed Mr. Rosner to proceed, with permission to Mr. Morris to argue the question later.

Witness (continuing): "Mr. Rude suggested giving a mortgage and note to Mr. Buchhalter"——

Mr. Morris: Now, just a—we object to that and move it be stricken out.

Mr. Lutz: I thought we were going to argue about that later.

Mr. Morris: Well, I desire to save an exception.

The Court: Put it in and we will pass upon the objection later.

Mr. Morris: I would like to be heard.

The Court: I said we would take it up this afternoon, and let the testimony go in subject to that.

Mr. Morris: Save an exception.

Witness (continuing:) "Mr. Rude stated that he wanted to give a mortgage and note to Mr. Buchhalter. He stated the reasons, or his reasons, for giving that note and mortgage at that time because he was worried. There was liable to be a partition suit brought by Mr. Bronstine, his partner in the mill;" that is the pulp mill in question and related to the interests involved in this suit. "And I asked

Mr. Rude what the consideration was going to be for that note and mortgage. He said there was not going to be any consideration. He said it was merely a fictitious note and mortgage for the purpose of stopping any law suit Mr. Bronstine might bring against him (Mr. Rude)."

Objection by Mr. Morris on the ground that it tended to [fol. 97] contradict and vary the terms of written instruments that have been introduced in evidence.

Objection overruled. Exception reserved.

Witness (continuing): "Mr. Rude and Mr. Buchhalter both asked my opinion on that, and I told them that I wouldn't agree with them; that I wouldn't draw a mortgage or note of that type for them, and told them I would take the matter up with them in the morning in the office." Witness states that this was done; that the next morning Messrs. Rude and Buchhalter came to the office of Blount, Silverstein & Rosner, where the conversation along this line was resumed; that Mr. Silverstein was present during the entire conversation and Mr. Blount, part of the time; that this was on the 29th of August, 1929, about ten o'clock in the morning, and both Rude and Buchhalter renewed the conversation respecting this note and mortgage that had been discussed with him, the witness, the night before. That "Mr. Rude stated to Mr. Silverstein and to myself and to Mr. Buchhalter that he wanted to make the mortgage and note to Mr. Buchhalter. We again informed him that that would be of no value; it was purely for a fictitious purpose and intended to stop any law suit Bronstine might bring against Mr. Rude. That was the purpose of the note and mortgage that morning, and they left the office with that. Later they came back again. I don't remember whether—it was about eleven o'clock in the morning I think, or eleven-thirty, and Mr. Rude said that he was going to give or would give the mortgage and note to Mr. Buchhalter regardless of what our opinion in the matter was, and just as they had agreed to do that, Mr. Rude said, 'No, Joe, you better give me the note and mortgage, the reason being that I want you to give me the note and mortgage is because I am in business in Dallas and I have to make a report to Dun and Bradstreet. You are not in active business, and it will hurt my credit.' So they re-

versed the process, and then the mortgage and the note were drawn in accordance with that arrangement, purely a fictitious paper."

Objection by Mr. Morris to the last phrase by the witness, the same stricken out by the court and the witness cautioned.

Q. I will ask you to state what was said by either Buchhalter or Rude, as to the character of the note and mortgage which was executed in the sum of $67,500.
[fol. 98] A. It was purely, as I say, for the season—it was merely an agreement between them to stop any law suit that Mr. Bronstine might bring against them.
Q. Is that what they said?
A. Yes, sir, that is what they said.

That both the parties spoke of the character of law suit they anticipated from Mr. Bronstine, and both said that the purpose of this note and mortgage was purely to stop litigation from Bronstine, or intended purely for that purpose.

Mr. Morris: I move that all this testimony be stricken out as incompetent, irrelevant and immaterial, and as seeking to contradict and vary the terms and effect of documentary evidence which has been introduced by the plaintiff.
The Court: You are going to argue that later. The record may show the objection goes to all this testimony.
Mr. Morris: I would like to save objections and exceptions to all this line of testimony.
The Court: The record will so show.

Witness states that he was present when the note and mortgage referred to, and involved in this suit, were delivered by Mr. Buchhalter to Mr. Rude, and that the parties arranged to place the mortgage of record in Adams County, Colorado; that witness has had a number of conversations with Mr. Rude after the institution of this suit; recalls one particularly on the 19th of January, 1930, one Sunday morning, when Mr. Rude telephoned the witness to come downtown to the Cosmopolitan Hotel, where he, Rude, was stopping; that Witness complied with this request and

there saw Mr. Rude, and the latter asked witness about a conversation concerning a check that Rude had given to Buchhalter for $5000, which was in part payment of the fee "he owed our firm."

Objection by Mr. Morris.

The Court: It is so petty, Mr. Morris.
Mr. Morris: Well, it is his conclusion.
The Court: I wish you would waive that objection.

Witness (continuing): That Mr. Rude's first question was in relation to the said mentioned check, and that Rude [fol. 99] then went on to say to the witness that "he was going to get Mr. Buchhalter, no matter what it cost him;" that he didn't care whether this note and mortgage were fictitious or not, or if he knew they were and I knew they were, that he was going after him just the same. "That conversation went on during the morning, and I told—Mr. Rude then called in Mr. Block, and later in the day called in Mr. Binstock, and the conversation went on as to this mortgage and note, but his prime move he said was to get Mr. Buchhalter, regardless of whether the note and mortgage were fictitious or not."

Q. Did he say anything to you about the validity of the note and mortgage, or did he not?
A. Yes.
Q. If so, what did he say?
A. He said that the mortgage and note was not a valid mortgage or note, but he was going to use it against Mr. Buchhalter.

Witness states that he had no further conversations with Mr. Rude about the subject matter of this suit; that the date of the one just testified to was January 19, 1930.

Q. Did he ever state to you what his grievance was against Mr. Buchhalter?

A. Objection by Mr. Morris. Sustained by the court. Exception reserved.

Witness states that Rude desired him, the witness, to arbitrate Rude's controversy with Buchhalter, but that he, the witness, "could never really understand what his controversy was."

Mr. Lutz: You may cross-examine.

Mr. Morris: I would prefer to reserve the cross-examination until your Honor has heard the argument on this. I think I can convince your Honor this testimony should all go out.

Recess until 2 o'clock P. M.

Protracted argument by counsel on plaintiff's motion to strike that part of Rosner's testimony which plaintiff's counsel, in said motion, stated sought to vary the terms and effect of documentary evidence introduced by plaintiff. [fol. 100] The motion to strike was denied by the court and an exception reserved by Mr. Morris.

Whereupon the witness ROSNER resumed the stand for cross-examination, by Mr. Morris.

Witness states that he is thirty years of age and has been practicing law about seven years, having been admitted in October, 1923; has also been admitted to practice in the United States Court. That witness was never personally the attorney for Mr. Rude, but that his firm had been; that witness became a member of the firm of Blount, Silverstein & Rosner in the early part of 1928; knows generally that that firm represented Mr. Rude as attorneys, but that he personally did not represent Mr. Rude; was present when a check for $5000 was given to the firm and knows that it related to services for several years back. Has known Buchhalter somewhat longer than he has known Rude, but has never represented Buchhalter personally until after his entry into the firm of Blount, Silverstein & Rosner; that his acquaintance with Buchhalter was casual, about the same as that with Rude; that he cannot give the exact date when he first met Rude in connection with matters handled by the firm; that Rude was always coming to the office, as was Buchhalter; that witness was never personally consulted by Buchhalter with reference to his interests in the paper mill, nor by Rude, respecting the case that was in the Supreme Court of Colorado, but that later, on August 28, 1929, witness was consulted. Witness is not familiar with the details of the litigation handled by his firm for Messrs. Rude and Buchhalter in connection with the pulp mill matter. Witness re-

peats that he was called by telephone on the evening of August 28, 1929, by Mr. Rude, not by the girl, who requested the witness to come down-town to the Roosevelt Hotel to Mr. Buchhalter's office; that witness complied and there found Messrs. Buchhalter and Rude present; is positive that Mr. Rude was there; does not know how it is that he happened to be called; that Mr. Silverstein had been attending to the details of the business for Messrs. Buchhalter and Rude; that witness referred these two to Mr. Silverstein on the matter for which they had called him down-town; that witness knew that Rude had a substantial interest in the paper mill property and knew that this property had been purchased at Master's sale; did not understand that Mr. Rude had title to a one-half interest in [fol. 101] the mill property, the understanding of witness being that a one-fourth interest was also owned by Mr. Buchhalter; that such was common knowledge around the office.

Mr. Morris calls for the original of Exhibit B, which is produced by Mr. Lutz. The same is exhibited to the witness, who states that he has seen it before. (This exhibit sets forth the interests of Messrs. Rude and Buchhalter as of date August 16, 1929, in the mill property.)

Witness repeats that on the night of August 28, 1929, Mr. Rude proposed to witness that he, Rude, wanted to put a fictitious mortgage upon the mill property; that such was what witness was called into the conference for. The first thing said by Mr. Rude was that "they wanted to put a fictitious mortgage on the property." There was no discussion as to the respective interests of Rude and Buchhalter; that then amounts for which the note and mortgage were discussed; that both Buchhalter and Rude suggested various amounts; that witness does not specifically recall the amounts discussed that night; that one figure mentioned that night was $120,000; witness thinks Mr. Rude was the first to mention that amount; that witness knew from Exhibit B that Rude had something over $60,000 invested in that property, but didn't know it from any other source; that the first proposition was that Mr. Rude was to give the mortgage to Buchhalter; repeats the first figure mentioned was for $120,000, and then that other figures

were discussed, and Buchhalter and Rude finally arrived at that figure; that later, Rude and Buchhalter discussed $60,000, and then $65,000 and then came up to $67,500, as witness recalls it; that all this time the proposition was for Rude to give Buchhalter a mortgage for one or the other of these amounts, finally hitting upon $67,500; that other amounts were discussed the next morning; that witness thinks $67,500 was the final amount suggested the evening of August 28th. The witness advised both Buchhalter and Rude that such a mortgage would be of no value at all, and "advised them against it." Witness knew from Exhibit B, the letter of August 16, 1929, that Rude was holding a portion of the property for Mr. Buchhalter.

Q. Now, can you tell the court as an attorney-at-law, admitted to practice, practicing law, what would have been the invalidity of Mr. Rude giving a mortgage to Mr. Buchhalter for $67,500?

[fol. 102] Objection by Mr. Lutz. Sustained by the court. Exception by Mr. Morris.

Witness states that according to the letter, Exhibit B, he was informed that Rude was holding a portion of the property in trust for Mr. Buchhalter, and advised both Rude and Buchhalter that a mortgage such as they had discussed would not be valid, as there would be no consideration; that the conference on this subject lasted an hour and a half or two hours; that other things were talked about in addition to the matter of the note and mortgage. (Witness again repeats that he is positive that Mr. Rude was present at all times at this interview on the evening of August 28, 1929;) that he again saw Mr. Rude the next day and Mr. Rude still wanted the mortgage drawn and stated that he desired it to be drawn, but that witness did not draw it; (that Buchhalter requested that it be drawn;) that witness took no part in its preparation; that witness did not remain present in the conference until the deal was finished. That witness saw Rude and Buchhalter a second time on the morning of August 29, 1929, about eleven o'clock that morning, when they returned to the office, after having gone out earlier; that on this occasion, both Buchhalter and Rude stated that they wanted the mortgage drawn; that such remark was addressed to all present; that

this time the amount of the mortgage was stated as being in the amount of $67,500; that on the previous interview the same day, it was also stated by both of said parties that they wished the mortgage drawn and the amount was placed at $67,500.

Q. At that time they told you they wanted a fictitious mortgage drawn, did they?
A. On the morning of the 29th.
Q. Yes.
A. Yes, sir.
Q. They told you that the mortgage was to be fictitious and was to be drawn?
A. Yes, sir.

That witness did not see the mortgage until after it came back from the Recorder's office. Witness corrects himself to state that he did see it drawn; that at this same interview there was also some discussion about conveying the [fol. 103] property from Rude to Buchhalter, and heard statements that deeds should be drawn for such purpose.

Q. Who was it advised the manner in which the conveyance papers should be made?
A. Both Mr. Rude and Mr. Buchhalter.

That Mr. Silverstein prepared the papers; that the only papers that witness saw at that time were the mortgage and the note. Witness repeats that he recalls that a deed was drawn, but that he did not see it at that time; that Mr. Silverstein prepared this instrument also; does not know how many deeds were drawn. On being shown Plaintiff's Exhibit C, witness states that he did not prepare the instrument and remembers but little about it; that the deed was acknowledged by Mary B. Reed, a stenographer in witness' office. Witness does not remember whether two deeds were drawn at the time or not, because he did not handle the matter; that he distinctly recalls about the mortgage and the note because Rude and Buchhalter called him and asked him about that.

Q. Do you mean to tell the court now that you didn't know that any deeds were prepared at that time, whereby the property was conveyed by Mr. Rude to Mr. Buchhalter.

Mr. Lutz: I object to that as immaterial, in the first place, and he didn't say any such thing, in the second place. It is improper form of question anyhow.

Objection sustained. Exception reserved.

Witness states that he thinks he first saw the two quit claim deeds that were given by Rude to Buchhalter, after their return from the Recorder's office, and that this was the first knowledge he had respecting those papers. Witness knows nothing about the actual transaction, except the note and the mortgage; he knows that these instruments were fictitious. That he saw Mr. Rude at different times after the 29th of August, 1929; that the next time he saw Mr. Rude on the same matter was on January 19th of this year (1930); that he thinks there were some intermediate conversations, but doesn't remember specifically. Recalls that he was present when $5000 was paid to witness' firm, and witness stated to both Rude and Buchhalter that the check should be made direct to the firm.

[fol. 104] Q. And you told Mr. Rude to sign a statement that he owed the account, did you not?

Objection by Mr. Lutz. Objection sustained.
Exception reserved.

Witness denies that in the conversation with Mr. Rude at the Cosmopolitan Hotel on January 19, 1930, he stated to Mr. Rude that whatever he might say would be regarded as confidential and would not be disclosed. Witness admits that on January 19, 1930, Rude stated to him, the witness, that Buchhalter had defrauded a number of people and had "crooked" him, and that he desired witness to straighten out the matter for him, and witness stated to Rude that, if desired, he would try to help straighten the matter out.

Q. Isn't it a fact that he stated to you that the bill shouldn't have been made to him, that the work was done at Mr. Buchhalter's request, and it should have been charged to Mr. Buchhalter?

Objection by Mr. Lutz. Objection sustained.
Exception reserved.

Witness denies that he stated to Rude that Buchhalter was wrong in the position he had taken. Witness thinks

that in certain matters his firm represented also Mr. Max Bronstine, but is not particularly informed respecting it; that Mr. Silverstein is better advised on such matter, but thinks his firm represented Mr. Bronstine in 1929; knows that Mr. Bronstine was a joint purchaser with Mr. Rude at the paper mill sale.

Q. And, Mr. Rosner, you also know, or you want this court to believe that your firm, representing Mr. Max Bronstine, Mr. Buchhalter and Mr. Rude, prepared a mortgage which you say is fictitious paper?

Objected to by Mr. Lutz, as argumentative, improper and immaterial.

Objection sustained. Exception reserved.

GEORGE DEXTER BLOUNT, a witness on behalf of the defendants, testified as follows:

Direct examination.

By Mr. Lutz:

That he is an attorney at law of Denver, Colorado, a [fol. 105] member of the firm of Blount, Silverstein & Rosner; recalls a conversation at his office on or about August 29th last (1929), when there was present Mr. Rude, Mr. Buchhalter, Mr. Silverstein and perhaps Mr. Rosner. Upon being asked to state the conversation, Mr. Morris interposes this objection:

"Now, just a moment. We make the same objections, to the effect that this testimony seeks to vary and contradict the terms of volum[illegible] written instruments, and is incompetent, irrelevant and immaterial."

Objection overruled. Exception reserved to all this line of testimony.

The Court: Let this objection go to all this testimony.

Witness (continuing): That upon the invitation of Mr. Silverstein, he went into the latter's room; that witness cannot fix the day or the hour of the day, but that it was the last part of August, 1929; that upon entering Mr. Silver-

stein's room he found there present, Mr. Joseph Buchhalter, Mr. I. Rude, Mr. Silverstein and Mr. Rosner, and that the following transpired: "When I got into the room I greeted these men. Mr. Silverstein said, 'We want you to come in here and give your opinion on a matter that is being discussed by us,' and I said, 'All right. What is it?' Then he told me what they were discussing, which in substance was this: He said that Mr. Rude and a Mr. Bronstine were the owners by purchase at sheriff's sale or receiver's sale of the assets of the Colorado Pulp & Paper Company, each having a one-half interest as shown by the record, and that they had been having trouble between themselves; that Mr. Bronstine was not inclined to meet his part of the expenses of conducting the mill, and he and Mr. Rude were in considerable controversy, and, as I recall, that Mr. Bronstine was threatening to start a partition suit. Mr. Silverstein was explaining this to me in the presence of these other men, and he said, 'Mr. Rude and Mr. Buchhalter have gotten together and figured out a plan of combating Mr. Bronstine,' and the plan was this: that Mr. Rude would transfer his title to an undivided one-half interest in this property to Mr. Buchhalter, and Mr. Buchhalter would give Mr. Rude a mortgage back so that the title would be complicated in the event that Mr. Bronstine sought to partition the property, and they had planned that out, and asked me what I thought about it, and I advised [fol. 106] very strongly against it. I told them it was nothing but subterfuge and in my opinion, a constructive fraud; that if they got into a law suit with Mr. Bronstine the whole plan would come out in evidence; that they would have to tell the truth, and that I thought it was a useless and a foolish thing to do, and I told them not to do it. * * * Then Mr. Rude and Mr. Buchhalter proceeded to argue with me as to the validity of that plan. I don't pretend to quote the words, but in substance, that they couldn't see my point of view; that they thought it was perfectly legitimate for them to put up this trick on Mr. Bronstine because he had not acted honorably and straight with them in connection with the handling of this paper mill, and the discussion along that line continued for half an hour I imagine. * * * Both parties—Mr. Buchhalter and Mr. Rude were arguing the matter with me, and I still told them what I have stated before."

Q. Do you recall whether there was any conversation as to who should give the note and mortgage, Mr. Buchhalter or Mr. Rude, one to the other?

A. Oh, yes, the plan which they told me they wanted to put into effect was for Mr. Rude to transfer title to Mr. Buchhalter, and Mr. Buchhalter was to give Mr. Rude a note and mortgage, and these papers were to be recorded, so that the whole transaction would show on its face a transfer of the title to Mr. Buchhalter by Mr. Rude, and the giving of a mortgage back to secure the note.

Q. Was there any figuring or computation in your presence as to the amount invested theretofore by either Mr. Rude or Mr. Buchhalter in this enterprise?

A. I don't remember about that. They had some figures that they told me about. I don't remember what those figures—as to what was to be the amount of the note.

Q. Did they state in your presence, either Mr. Rude or Mr. Buchhalter, the purpose of executing this note and this mortgage?

Objection by Mr. Morris. Objection overruled.
Exception reserved.

A. They did. Both of them said in the course of this conversation that the object of giving the note and the mortgage and the deed was to fool Mr. Bronstine.

[fol. 107] Cross-examination.

By Mr. Morris:

States that he knew, before this conversation took place, that the mill had been bid in by Mr. Bronstine and Mr. Rude; that witness participated in the confirmation proceedings; that witness' firm never represented Mr. Bronstine and never charged him any fee in connection with the matter, and that his firm absolutely did not receive $2500 for services performed for Mr. Bronstine. Witness examines Plaintiff's Exhibit N and admits it to be a photostatic copy of a letterhead of his firm; that he has also seen the original of this exhibit; that the same does not refresh his recollection as to ever having collected $2500 for representing Mr. Bronstine.

Q. Now, Mr. Blount, in this there is a parenthetical clause which recites "exclusive of services separately

charged to I. Rude and Max Bronstine and already paid for jointly to the firms of Van Cise and Robinson and Blount, Silverstein & Rosner." Did you work for the protection of Mr. Bronstine?

A. No. His attorneys were Van Cise and Robinson. Not us at all.

Q. Do you mean to say you never represented him or made any charge at all?

A. None at all.

That witness was not present at the conference when the papers were drawn and that he did not know that the papers were drawn until he was called as a witness in this case about two months ago (first hearing); that he only knows by hearsay who prepared these papers (the note, trust deed and deeds); that witness did not know the deal had ever gone through until this suit was brought; that by hearsay he knows that Mr. Silverstein prepared the mortgage and note and deed of trust; that Mr. Silverstein had recently so informed him. Repeats that he never knew these papers were prepared until the institution of this suit.

—. When was that?

A. It was on the docket for trial about last June or July. Mr. Lutz questioned me about being a witness in this case, and that was the first time I knew these papers had ever been prepared.

Witness states that when he left the conference the same was not over; that witness was present about half an hour and argued this question with them and then went back to [fol. 108] his own room; that he does not remember any discussion about a mortgage for double the amount of any indebtedness; that he does not remember a discussion of figures. "It was the plan they were talking to me about, and I wasn't interested in the figures." He remembers no discussion of the amount of $130,000; that he has no recollection what the amount of the mortgage was that was mentioned.

Q. You knew at that time, did you not, Mr. Blount, that the parties each claimed about a half interest, or a quarter of the entire property each, do you not?

A. I understood at that time that there was some private contract existing between Mr. Rude and Mr. Buchhalter, whereby Mr. Buchhalter had a half of the interest that appeared of record as belonging to Mr Rude. That is my recollection.

Q. Well, Mr. Blount, the mortgage that you were consulted upon was not based upon any consideration, was it? Can you answer that by yes or no?

A. It was not based upon actual consideration, no, but a fictitious consideration only.

Again, asked respecting the amount of the mortgage, he states that he does not remember, but it seems that possibly there was some talk about a mortgage around $60,000, "but I don't remember the details of that, because they were consulting me about the scheme." That witness does not definitely know what amount the mortgage was to be drawn for; that the proposition was to create difficulty for Mr. Bronstine, and that it was upon that proposition that witness advised it should be done. Witness does not recall that Mr. Rude stated that he had consulted Mr. Rosenbaum with reference to putting on a mortgage for more than the amount that was owing to him out of the property and that Mr. Rosenbaum had told him (Rude) that he would not be coming into equity with clean hands if that were done. States he has no recollection whatsoever of any reference to Mr. Rosenbaum in the conversation; that witness knew nothing about what was done after he left the conference. Repeats that he never mentioned Mr. Rosenbaum's name to Mr. Rude; that if he did, he does not recollect it; that upon leaving the conference, witness thought Rude and Buchhalter had decided not to go through with their plan.

[fol. 109] Redirect examination.

By Mr. Lutz:

Q. Now, Mr. Blount, you may explain the precedent connection, if any, with the bill that was shown for services, if any, for Mr. Bronstine.

A. Why, Mr. Bronstine and Mr. Rude and I believe Mr. Buchhalter were interested in the same litigation. The attorneys for Mr. Bronstine were Van Cise and Robinson

and Mr. J. E. Robinson, and the total value of the services altogether as represented by the bill were $2500. As an accommodation to the office of Van Cise and Robinson and J. E. Robinson, we sent the one bill for the total amount. Out of the money paid we got our share, and Van Cise and Robinson got their share as attorneys for Max Bronstine.

Witness states that neither witness nor his firm ever represented Mr. Bronstine direct, that he ever heard of in his office.

CHARLES ROSENBAUM, a witness for the defense, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states he is a resident of Denver, an attorney-at-law for approximately nine years last past; is acquainted with both Messrs. Rude and Buchhalter, having known each of them exceeding ten years; has acted as attorney for both of them and is now so acting in some matters; that both Rude and Buchhalter called upon the witness together on August 29, 1929.

Q. Will you state what conversation was had by them in your presence and to you at that time and to each other.

Objected to by Mr. Morris as incompetent, irrelevant and immaterial, and for the further reason that it is an effort to vary and contradict the terms of written instruments.

Objection overruled. Exception reserved.

A. Mr. Rude and Mr. Buchhalter both came to my office some time in the forenoon of that day, and they explained to me—this is the substance of the conversation. I don't attempt to give it verbatim. They explained to me that Mr. Rude and Mr. Bronstine, who held title jointly in the [fol. 110] Colorado Pulp Company property, had been having some difficulties between themselves, and they had been unable to get along together, and it was their desire that Mr. Buchhalter be substituted as the half owner, because he, Mr. Buchhalter, felt he could deal with Mr. Bron-

stine more advantageously than Mr. Rude wa dealing with Mr. Bronstine, and could force the matter to an issue either by causing Mr. Bronstine to buy out the other half interest, or to in some way work jointly, and they stated that if this was done they were afraid Mr. Bronstine would file suit for to partition the property, and that he, Mr. Bronstine, was then in a better position to bid in the property at a partition sale than they might be. They stated that they therefore wanted a mortgage drawn representing the approximate amount of their joint investment, and that it was their plan to give the mortgage to Mr. Rude, and asked me first to draw such a mortgage, or, first, whether I would draw such a mortgage, and secondly, they asked my opinion as an attorney as to whether or not in a partition sale the property would have to be bid in subject to the mortgage of record, or whether the mortgagee, being a non-resident of the state, could be made a party defendant. I thereupon first advised them that I would not draw such a mortgage, and I also turned to Mr. Rude and stated, "I wou-d not advise you to convey the property to Mr. Buchhalter." I referred to him as Joe. "I would not advise you to convey the property to Joe because I don't think it would come with good grace after the understanding between yourself and Mr. Bronstine was that you would be the half owner with him, and that he would not be compelled to deal with Joe, and if this matter of the mortgage ever came into litigation you would not come into court," I believe I used the expression, "with clean hands, and I don't advise you to do this. In any event I will not participate in it by drawing any of the papers." Mr. Rude then stated that he felt he might perhaps be justified in conveying to Buchhalter because Mr. Bronstine hadn't treated him fairly in that he had not advised with him concerning certain insurance policies, and had given certain insurance policies to a friend of his, on which he thought perhaps Mr. Bronstine was making a personal profit, and I told him that I still felt in spite of that, a man of his standing and with his reputation in the community ought not to do that which it was generally taken for granted he would not do, in [fol. 111] making Mr. Buchhalter part owner of the mill, and thereby compelling Mr. Bronstine to deal with him rather than to deal with Mr. Rude. I told them, however,

that I would look into the law as to whether the mortgagee could be made a party defendant and his rights determined in the same suit although he was not a resident. Mr. Buchhalter then turned to me and stated. "Now, if you were drawing this mortgage for how long a term would you draw it?" and I stated the ordinary mortgage of that type is drawn for either three years or five years. Mr. Buchhalter says, "Well, that is where you are wrong, because if we did draw this mortgage, we would draw it for either three months or six months, because if it was a three or five years' mortgage, Mr. Bronstine could bid in the property subject to the mortgage and operate the property subject to the mortgage and without money, and not be compelled to pay the mortgage for either three or five years. What we want done is to get our money out of it as soon as we can. If we decide to draw this mortgage we want it drawn for three months or six, so we could declare the mortgage due immediately and get our money out of the property." I again reiterated that I would not draw the mortgage, and told them, however, that I would be glad to look into the law and advise them what the law was, although I would have nothing to do with the drawing of the mortgage. I also recall that the amount of the mortgage which they discussed at that time was a mortgage which would represent their joint investment in the property of approximately $135,000. They stated they wanted to make the mortgage so that if the property were bid in by Mr. Bronstine and he were compelled to pay the mortgage, he would have to pay out an amount that would be sufficient to reimburse both of them for their investment.

Mr. Morris moves that all of the foregoing be stricken out, as incompetent, irrelevant and immaterial, and as tending to contradict written instruments in evidence.

Objection overruled.

Q. Was there any discussion, Mr. Rosenbaum, in your presence as to who should give the mortgage to whom, whether Mr. Rude to Buchhalter, or vice versa?

A. When they came to my office it was their idea to give the mortgage to Mr. Rude for the reason that Mr. Rude was [fol. 112] a non-resident of Colorado, and they felt or at first thought or were of the opinion that Mr. Bronstine

would therefore have to go down to Dallas to sue Rude, and asked me also to investigate the law as to whether they could make Rude a party defendant as a mortgagee, as I stated, although at that time he was living in Dallas.

Witness thinks he has given the entire conversation so transpiring. Repeats that this all took place in the forenoon of August 29, 1929; that either Rude or Buchhalter called him up in the afternoon of the same day and asked whether he had looked up the law as to whether a mortgagee, although a non-resident, could be made a party defendant in this suit, and witness advised the party calling, what he had found concerning the law; that witness had further conversations with Mr. Rude thereafter, the time of which he fixes in the month of November, upon which occasion Rude gave to the witness a set of figures drawn by Mr. Block and discussed those figures with the witness, as his attorney.

Q. Mr. Rude did give you a set of figures, did he?

A. He handed me a set of Mr. Block's figures.

Q. Well, didn't he give you any figures that he had gotten up? Didn't he dictate to you some figures?

A. No. The two of us then compiled certain figures from Mr. Block's statement and from figures which he gave me from memory at that time, which I jotted down.

(A copy of which figures, witness says he gave to Mr. Buchhalter.)

Q. By the way, did Mr. Rude ever in your presence or do you claim that he had a valid note for which he was looking for payment from Mr. Buchhalter?

Objected to by Mr. Morris. Objection sustained.

Exception reserved by Mr. Lutz.

Witness is here handed Defendant's Exhibit 12, which he identifies as a copy of the typewritten figures which he gave to Mr. Buchhalter.

Objection by Mr. Morris.

Colloquy between court and counsel.

Objection sustained by the court.

[fol. 113] Witness repeats that Mr. Rude and he jointly compiled a set of figures, and Rude requested that they be

submitted to Mr. Buchhalter, which was done; that the original was given to Mr. Buchhalter.

Mr. Lutz: I will ask you to bring the original.
The Court: You haven't proved the authority yet.
Mr. Lutz: Well, I reserve an exception.

Cross-examination.

By Mr. Morris:

Witness states that the mortgage about which witness was consulted was one for approximately $135,000. "It was supposed to represent their joint investment in the mill." Witness was told that Mr. Rude at that time had title to the property; that no figures were gone over; that generalities only were dealt in. Witness does not recall discussion of any amount or particular amounts. "It was merely that their joint investment represented approximately $135,000." Witness was not told and did not know the exact amount that either of them had, nor what their respective proportions were at that time. Witness was again asked whether he knew at that time what the respective interests of the parties were in the property.

To which Mr. Lutz objects, as being immaterial, and not cross-examination. Objection sustained by the court.
Exception reserved.

Q. Mr. Rosenbaum, did Mr. Buchhalter state to you in any of these conversations the amount of money that Mr. Rude had invested in the plant and the amount that was owing to him?

Objected to by Mr. Lutz, as incompetent and immaterial, and not cross-examination.
Objection sustained. Exception reserved.

Witness states that he was employed by both Buchhalter and Rude in various phases of this matter; that they both came to him, trying to employ him to draw the mortgage and that he turned down the employment; that he refused to do the work, that is, to draw the mortgage.

Q. Mr. Rosenbaum, at the conversation to which you have testified, on the 29th of August, 1929, was it stated to [fol. 114] you by Mr. Rude in Mr. Buchhalter's presence, as to the amount of money which he had advanced to Mr. Buchhalter?

A. No, sir, not to my recollection.

Q. They simply told you of the amount that they had jointly invested in the property.

A. Approximately. They didn't give me the exact amount, but they told me it was somewhere in the neighborhood of $135,000.

Witness does not remember that any other figure was discussed.

Morris H. Block, a witness for the defense, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he has resided in Denver about thirty-three years, is acquainted with both Mr. Rude and Mr. Buchhalter, having known the former twenty or twenty-five years, and the latter fourteen or fifteen years; that he was in the court room some two months ago and heard Mr. Rude's testimony that he, the witness, negotiated the so-called Binstock deal; that he had a conversation after August 29, 1929, respecting the so-called Binstock deal, with Mr. Rude, fixing the time of this conversation about the middle of September, 1929, and states:

"I came to the office of Mr. Buchhalter in the Roosevelt Hotel, and Mr. Rude and Mr. Buchhalter were there, and I submitted the proposal to them from Mr. Morris Binstock for the purchase of their half interest in the paper mill. I read the proposal to them. It offered to pay $19,000 in cash, one-half of the net inventory at the time of closing, net inventory of the paper mill at time of closing, and the remainder of $92,000 in bonds of a company to be formed by Binstock after he had acquired this particular interest and the interest of Mr. Bronstine, which interest he was also negotiating at the time. After reading over, I turned to Mr.

Buchhalter and Mr. Rude. Rude said that he wouldn't accept it. He said he wouldn't be interested in selling for part bonds, that if he sold he would expect all cash. Mr. Buchhalter then said, 'Supposing that I let you have all the cash that comes into this transaction. Would that be [fol. 115] fair?' 'Well,' Mr. Rude says, 'No, that wouldn't be fair. It wouldn't be fair to you, Joe, but it is not a question of fair or not fair. I wouldn't sell for bonds.' Later on in the conversation Rude said, 'But, Joe, I wouldn't stand in the way of a deal. If you want to go ahead with this deal, go ahead with it. I will take whatever cash comes in, and, as for the balance, I will give you six months or a year.' Mr. Buchhalter said, 'No. If I am to pay the cash, then I will have to have $10,000 more down payment from Binstock, and, as for the rest of it, I think perhaps I can arrange something with the bank,' and I said well, that Mr. Binstock couldn't give any more cash. Well, Rude said that he wouldn't accept it, he wouldn't accept any bonds."

Q. Did that deal go through?

A. And we adjourned. Nothing had been agreed upon. Mr. Buchhalter declined it because he wanted $10,000 more in cash in the deal. Rude declined the offer because it offered bonds and not all cash, so that deal didn't go through that night. I went to Mr. Binstock and told him what was asked, and then about two days after that, Mr. Binstock and I met at Mr. Robinson's office, his attorney, J. E. Robinson, and Mr. Robinson said, "That isn't the negotiation——"

"That night I came to the office of Mr. Buchhalter again. I met Mr. Rude and Mr. Buchhalter there. Mr. Silverstein was there.

Q. About when was this? Can you fix the date?

A. This was two days or three days after this evening that I just told you about.

Q. In latter September, 1929?

A. It was about the 18th or 19th of September of 1929, and I submitted to Mr. Rude three instruments and asked him to sign them. These instruments were a release of a deed of trust and a bill of sale for the physical property of the paper mill, and a quit claim deed, and I asked him to sign them and leave them with someone in trust until he

could give them final instructions as to their disposition. I told them that I was still working with Mr. Binstock, and that if the sale was consummated during his absence that he would need these particular releases to consummate the sale without any delay or waiting his return. He signed them and turned them over to Mr. Silverstein, and told him [fol. 116] that he would give him instructions as to the disposition later. That was all at that time."

Q. Can you state what deal went through?

A. I can state what deal went through, but I never reported the consummation of the deal to Mr. Rude.

Witness made a claim for commission for his services in that behalf, to both Messrs. Buchhalter and Rude; that this was done some time in November, 1929, a written bill was presented in the sum of $2,500, this taking place at Buchhalter's office at the Roosevelt Hotel; that Mr. Rude was present; that that bill was not paid.

Q. What discussion did you have with Mr. Rude about the payment of the bill?

A. Mr. Rude reminded me that at the first interview he had asked me if I expected a commission in the transaction, and I told him that I was not working for a commission particularly, that I really didn't expect a commission. He told me then, however, that he didn't expect me to work for nothing, and, nevertheless, when I presented my bill of $2,500.00 he felt—he reminded me of it, and they thought I shouldn't ask for any such sum as that, and he said "In fact, I don't wish to pay any commission, but I think you are entitled to something, and I will give you a token of $500.00, as a token.

Witness agreed to accept $500.00 "as a token," and that he was to get $500.00 more in the event certain moneys were returned by the receiver of the old paper mill; that the said sum of $500.00 was paid by Mr. Buchhalter, and not by Mr. Rude; that witness made a set of figures at the joint request of Messrs. Rude and Buchhalter, respecting their interests in the property. Whereupon, Defendant's Exhibit 6 was exhibited to the witness, which he identifies as the set of figures that he prepared at the request of Mr. Rude and Mr. Buchhalter; that his data for these figures were supplied by those two, and that Mr. Rude stated to witness that

he had $61,000 invested in the old Colorado Pulp and Paper Company, and that the figures were set down as given to the witness by Rude and Buchhalter.

At this juncture Mr. Morris was allowed to interrupt and cross-examine to the following effect:

Q. Mr. Block, Mr. Rude didn't tell you what to put in this statement; these were your own figures and your own method of computation, not what Mr. Rude requested you to put in?

[fol. 117] A. These are the figures that Mr. Rude gave me, and I put them down. That is, we arrived at certain computations. I made the computation with figures Mr. Rude and Mr. Buchhalter gave me as to their respective interests.

Q. The language and the figures are yours?

A. The figures I wrote myself, and the wording in there are mine.

Mr. Lutz resumes the direct examination.

Q. But it was in conformity with statements and figures that had been given to you?

A. Yes, sir.

Q. You simply computed the figures?

A. Yes, sir.

At this juncture Defendant's Exhibit 6 was offered in evidence. Objected to by Mr. Morris.

Objection sustained.

The witness was permitted to use the exhibit to refresh his recollection.

The Court: They were not put down at their request and they are in no way binding upon them. He has not testified he needs any help.

Mr. Lutz: He has testified they were put down at their request as representing their interest.

Witness then states that he spent several hours in getting up the computation of the interests of Messrs. Rude and Buchhalter, giving a copy of his figures to each one, and that these figures were accepted by Rude and Buchhalter as being correct. Witness denies the time of this computation as the evening of the day that Rude and Buchhalter

drew down certain money from the First National Bank (November 18, 1929). Upon being asked to give the figures as given to the witness by each of the parties as representing their interests, witness states, "Well, Mr. Buchhalter told me he had invested $58,422.32 in the old Colorado Pulp and Paper. Mr. Rude told me that he had invested $61,000 in the same enterprise. Mr. Buchhalter told me that he had drawn down that afternoon $11,615.22 from the First National Bank. Mr. Rude told me that he had drawn down $16,365.34 from the First National Bank that day. They [fol. 118] both told me that there was $92,000 worth of bonds at the bank then, and they wanted me to figure up what the interest was to each one of them, and I figured out that the present investment in bonds at that time, that is, to Mr. Buchhalter was $47,212.48, and I wrote in that the present investment in bonds for Mr. Rude at that time was forty-five thousand——

Objection by Mr. Morris and motion that the last statement be stricken.

The Court: He can testify from his own recollection as to what happened. What he put down on that paper is not binding upon either party, was not done at their request, was not authorized in any way. He can testify as to his own recollection as to what happened.

Mr. Morris: I move that be stricken.

The Court: Just that last statement. He may testify as to his own recollection. He may use that to aid him. That paper is not binding upon anyone.

Q. Did you make that at the request of the parties?

Objection by Mr. Morris. Objection sustained.
Exception by Mr. Lutz.

Q. Is there anything else there that represents what they told you as their respective interests?

Objected to by Mr. Morris. Objection sustained.

Q. Have you given all that they told you at that time?

A. Well no. That evening Mr. Rude said to Mr. Buchhalter, "Now, Joe, this entire transaction represents a loss to me, and," he says, "you did earn $17,000 in the purchase of claims of the old Colorado Pulp & Paper Com-

pany." He said, "That was before I came into this transaction with you, and legally I am not entitled to any share of that money, but in view of the fact that this does represent a loss to me I feel that you should give me half of the net profits to you from the purchase of those particular claims." Mr. Buchhalter said that he didn't think there was very much profit left, if any; that he had paid out commissions, attorneys' fees and so on. Mr. Rude said, "Whatever there is left, I feel that I should have one-half of that." Well, Mr. Buchhalter didn't consent to give it [fol. 119] to him. Mr. Rude said to me, he says, "You put down on this sheet of mine these figures. Put down, 'Claim $17,000, one-half of which is $8,500.' Put down that I have received $3,000 and that would leave a remainder of $5,000." I put all those figures down, and I also wrote down then, "Subject to adjustment," because really there had been no consent or agreement that any of this would be paid to Mr. Rude.

Q. Did either of these parties state to you what was the purpose of giving you these figures?

A. Well, they said that Binstock had paid in this money and these bonds into the bank, and they wanted to know how much each one had coming in this transaction.

Q. Did you only have two interviews with Mr. Rude prior to the sale of the premises, or did you have some other conversations with him? Do you recall a conversation where he rejected a sale, and said that he was doing business on his money, or something?

A. Well, in the very first interview, he said, "That is a very poor deal for us." He says, "The little money they are paying in with the bond issue for so many years, it would really be in effect that they were buying this plant for a very small sum, and paying us out with our own money." He said, "I would rather put in $50,000 and have Buchhalter put in $50,000, and we will buy their interest;" the paper mill was a very good business, and it would be a very poor deal to sell it on the basis as offered.

Witness states that the last foregoing transpired at the first interview with Mr. Rude, which was about the middle of September, 1929; that on the night when witness made the above mentioned figures and computation, Mr. Rude never mentioned the $67,500 note, nor was it referred to in any way.

Cross-examination.

By Mr. Morris:

Witness states that at the second meeting witness had with Mr. Rude, witness requested Mr. Rude's execution of a release of the mortgage or trust deed; that nothing respecting this was said at the first meeting; that at the second meeting, witness brought three instruments for Mr. Rude to sign, one of them being a form of a release of a mortgage, which Mr. Rude executed; that witness had learned of the fact of the mortgage and asked Rude to sign a release thereof so the property could be sold.

[fol. 120] Q. It is a fact, is it not, that in the first conversation you described, Mr. Rude repeated continuously that he would not take any bonds for the amount that was owing to him or that he had invested?

A. There is a difference, isn't there, between owing to him and had invested?

"He said he would not take any bonds for the amount of money he had invested. I didn't know anything about any money coming to him. Rude wanted the cash."

Q. Isn't it true that the final understanding and outcome of that conference was that the only way that Mr. Rude would consent to have the deal go through, and surrender his interest in the property, was that he receive at least $40,000 in cash.

Objected to by Mr. Lutz, as calling for conclusions entirely on the part of the witness.

Objection overruled. Exception reserved.

A. I don't recall that any $40,000 was mentioned. Mr. Rude said that he would take all the cash that would come into this transaction originally, and as for the remainder, he would give Buchhalter six months or a year.

That Rude stated repeatedly that he would not accept any bonds upon the sale.

Q. Isn't it a fact that the instructions which he left with reference to the sale of the property were such that it should not be sold except that he receive cash for his interest in the property?

Mr. Lutz: That is indefinite, the instructions that he left, and if he had the note, what interest did he have in the sale or the proceeds?

Objection overruled. Exception reserved.

A. He said, "I want no bonds. I want all cash."

Q. Yes. And then you went to work under Mr. Buchhalter's instruction, did you not, to carry out what Mr. Rude had stated?

Mr. Lutz: Well, I object to that. That is an improper question and is not cross-examination, and not material.

Objection overruled. Exception reserved.

[fol. 121] A. I continued my negotiations with Mr. Binstock, and offered the contract finally which was in effect exactly the same as originally offered, and Mr. Buchhalter signed it and Binstock signed it.

Q. And that was the very contract, the terms of which Mr. Rude said he would not accept.

Objected to by Mr. Lutz.

Objection overruled.

A. Well, there were quite a few conditions in that contract.

The Court: Read the question to the witness, and you answer the question.

(Question read to the witness.)

The Court: Answer yes or no.

A. I don't know how to answer that question yes or no.

The Court: It was either the contract, or it wasn't. Now, state.

A. You see, Mr. Rude never objected to any contract.

The Court: Answer the question. It was either that contract or it wasn't.

A. Well, it was that contract.

Q. Mr. Block, is it true that in spite of Mr. Rude's objection, you went ahead under Mr. Buchhalter's instructions and negotiated a contract whereby he couldn't get the cash

which he said that he wanted before he surrendered his interest?

Objected to by Mr. Lutz, as not proper cross-examination, argumentative, etc.

Objection overruled. Exception reserved.

A. That is not true.

Q. Well, isn't it true, Mr. Block, that the final contract which you did make on behalf of Mr. Buchhalter with Mr. Binstock was one, the terms of which Mr. Rude strenuously objected to before he left?

A. He didn't object.

Q. Well, didn't you state that he objected unless the deal [fol. 122] was made so that he would get his cash or secure notes out of the enterprise?

A. He said, "I wouldn't stand in the way of a deal. If you want to go through with this deal, go through with it. I will take whatever cash comes in, and as to the balance, I will give you six months or a year." Now, I had no reason to believe that couldn't be carried out with Mr. Buchhalter.

Witness states that Buchhalter said at that time, "If I have got to give you all the cash, then I must have $10,000 more from Binstock, and as to the remainder, I will have to go to the bank for it." That would give Mr. Rude his cash; that witness had no instructions from either Rude or Buchhalter; that he simply submitted the offers which were finally accepted by the latter; that Mr. Rude was out of the city during that time.

Trial resumed at 10:00 o'clock A. M. Friday, September 26, 1930.

William F. Rogers, a witness for the defense, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he is vice-president of The First National Bank of Denver, Colorado, and has been such for

twelve years last past, and was such during all of 1929; that he is acquainted with Messrs. Buchhalter and Rude; that he has not known the latter very long, but has known of him; that he has known Mr. Buchhalter quite a few years; that the bank is escrow holder of certain funds and bonds in which these parties were interested; that witness had some of the papers relating to the escrow with him; that he has with him the instrument under which the escrow was held; that he, the witness, had sole charge of the escrow for the bank; that he recalls an occasion in November last (1929) when Messrs. Rude and Buchhalter called upon him at the bank and drew down certain funds; that these parties came in and apparently were ready to close the transaction, and that witness simply drew up a receipt for them to sign and delivered to them the proceeds that he had; that witness prepared the receipt; that both Buchhalter and Rude signed it, and witness issued a cashier's check jointly to both of them; that this cashier's check was delivered to [fol. 123] them, made payable jointly; that neither Buchhalter nor Rude requested that the check be drawn jointly, but it was done in that manner and was accepted by them; that witness heard no portion of any conversation between the two, respecting their respective or particular interests; that Mr. Rude did not tell the witness anything about his having or claiming a lien on the bonds in the bank, and that Mr. Rude never made any demand upon witness or the bank for the sale of the bonds to gratify any claim or lien.

Q. Was anything said to you by either of them with respect to the duration of the escrow?

A. Yes. One of them asked me whether it would be all right to leave the bonds there. * * * One of them, I don't recall which one, wanted to know if the bonds could remain there on the escrow until they had arrived at a settlement, which I agreed to do.

Witness states that he does not remember which particular one made that request; that both of them were there at his desk; that such is the extent of witness' connection with the matter.

Cross-examination.

By Mr. Morris:

On request, witness produces the escrow agreement, which simply consisted of the contract between Messrs.

Buchhalter and Binstock, Plaintiff's Exhibit G. Witness states that the further instructions consisted only of a copy of the telegrom to the Denver National Bank by Mr. Rude; that the bank does not have any written form of escrow agreements, printed or otherwise; that just a memorandum is employed; that the bank utilizes the agreement between the parties for its escrow instructions and does not use a written form; that witness received for the bank the $67,500 note in question, signed by Buchhalter, payable to Rude; that this was delivered to The First National Bank by The Denver National Bank.

Q. Prior to the time that Mr. Rude and Mr. Buchhalter came in on the occasion that you described, had Mr. Buchhalter been there and told you what was going to happen?

Objected to by Mr. Lutz, as not cross-examination.
Objection overruled. Exception reserved.

[fol. 124] A. Why, I don't recall whether they did or not.

That the first time the witness saw Mr. Rude in connection with this transaction was November 18th (1929); that he and Buchhalter came into the bank after banking hours on that day; that witness leaves the bank at different times, whenever he can get away, from four to six o'clock; that he does not remember that Mr. Buchhalter communicated with him to remain there on that day; that witness did not make out the cashier's check, but that such was done by the bank's draft clerk; that when the fund was received, witness made out a joint cashier's check payable to Rude and Buchhalter.

Q. And that was made at the request of Mr. Buchhalter, was it not?

A. I wouldn't say so.

Q. Well, now, how did you know that they were coming in at that hour of the day? Hadn't Mr. Buchhalter phoned you?

A. No, I didn't know they were coming in. We have people come and go all day, and as long as you stay there they will come in.

Exhibit D is exhibited to witness and he states that it looks like the note; that he is familiar with the signature of Joseph Buchhalter; that the signature on the note is not

Mr. Buchhalter's bank signature; repeats that it looks like the note that had been received by The First National Bank; that there are no particular identification marks on it. Witness knows such a note was received, but it went out of the bank's possession. The amount of the note was $67,500; that as nearly as witness can recollect, Plaintiff's Exhibit D is the note received by The First National Bank prior to the time Mr. Rude and Mr. Buchhalter came in, and which was received from The Denver National Bank; that there was also received the deed of trust, which was attached to the note.

Q. Now, Mr. Rogers, it is a fact, is it not, that Mr. Buchhalter told you that he wanted to pay his indebtedness to the bank at that same time when he came in?

A. No, I don't think he said anything to me about that.

Q. Well, Mr. Rogers, you received out of this escrow from Mr. Buchhalter, the sum of something over $11,000 at that same time?

[fol. 125] Objected to by Mr. Lutz, as not cross-examination; a private matter of Mr. Buchhalter's.

Objection overruled. Exception reserved.

A. No, I didn't receive anything from him.

Q. Well, didn't the bank receive that?

A. Well, I don't know whether it did or not. I haven't got all the bank records here, Mr. Morris. I know Mr. Buchhalter made a payment on his note. What the detail is, I couldn't give it to you offhand.

Witness states that he did not, himself, receive any payment from Buchhalter; that if it was paid to the bank, it was paid through the Discount Department; that only one cashier's check was made out to the parties; that this was in the sum of $16,365.34, payable to the order of I. Rude and Joseph Buchhalter jointly; that the total amount on deposit in the bank was some $28,000 in connection with this escrow, and that it is not a fact that the bank retained the difference between sixteen thousand dollars plus and $28,000 to cover an indebtedness which Buchhalter owed to the bank; that witness could give the detail of the transaction if he had an opportunity to go through the bank's records; that the receipt of Buchhalter and Rude to the bank was for the total sum of $28,080.56; that witness does

not have with him a record of the details of the transaction nor a record of some Manufacturers' Bank stock, interrogated about; that witness does not know whether there had been deposited with the bank as collateral the shares of Manufacturers Trust Company belonging to I. Rude. Witness then states that such a certificate was "not on deposit;" that witness recalls sending the same to Mr. Rude at Dallas, Texas; that the certificate was purchased by Mr. Buchhalter.

Q. Well, now, I will ask you, Mr. Rogers, whether it is not a fact that that Manufacturers Trust Company stock that had been deposited was paid out of the escrow funds to the extent of $5,130, by the First National Bank.

Objected to by Mr. Lutz as wholly immaterial and foreign to the issues of the case.
Objection overruled. Exception reserved.

A. Yes, it was.
[fol. 126] Q. And wasn't that due to the fact that that stock belonged to Mr. Rude?

Objected to by Mr. Lutz.
Objection overruled. Exception reserved.

A. I didn't know who it belonged to. I was directed to buy it, and bought it.

Witness states that the same was purchased in the name of I. Rude; that receipt in witness' hands signed by both Buchhalter and Rude, called for the sum of $28,080.56; that the bank did not retain $11,000 or any other sum from the escrow; that witness turned the check over to Rude and Buchhalter, and does not know what they did with the proceeds. Again states that he cannot explain the difference between the $28,000 and the $16,000 without his records.

Mr. Morris then calls for certain records and the Court directs that a list of those desired be made.

Lengthy colloquy between Court and counsel respecting questions to be asked and records to be produced.

It is admitted by Mr. Lutz that $11,000 went to take down 200 shares of Cities Service stock, but all objected to by Mr. Lutz as having no relationship to the case, not

cross-examination, and incompetent, irrelevant and immaterial. Most of which was sustained by the Court.

Upon resumption of examination, witness states that he did not deliver any cancelled notes to Mr. Buchhalter, which the latter had theretofore owed the bank, and does not know that any such notes were delivered by the Discount Department, or otherwise; that witness did not deliver anything to Rude to show the transaction relative to the purchase of the 40 shares of the Manufacturers Trust stock, but that a certificate of such stock was forwarded by witness to Rude; that witness presumes that a bill was attached to the certificate.

Q. It is a fact that that stock was sent to Mr. Rude to replace 40 other shares of stock which he had theretofore had upon deposit with you, is it not?

Objected to as incompetent, outside of the issues, and not cross-examination.

Objection sustained. Exception reserved.

[fol. 127] Witness repeats that his recollection is that the certificate in question was mailed to Mr. Rude at Dallas, Texas; that it had been purchased through a broker.

The Court: Why is that material?

Mr. Morris: Well, it shows that Mr. Rude had no part in this. What I want to show, may it please your Honor, is that Mr. Rude entrusted forty shares of Manufacturers Trust Company's stock to Mr. Buchhalter; that Mr. Buchhalter takes it to the bank and puts it up as collateral for his own indebtedness, and Mr. Rude is first informed that that is where his stock was, and was informed that the bank had sold out that stock, when the stock crash came, which happened between August and November, and that Buchhalter was replacing that stock in this same transaction.

Mr. Lutz: What has that to do——

Mr. Morris: I think it has a great deal because it is claimed here of the charge of the trust and confidence which Buchhalter is alleged to have reposed in Rude. As a matter of fact, Rude is the one who reposed trust and confidence in Buchhalter, and this transaction shows it, his stock, not Buchhalter's stock.

The Court: The trouble is that you have a man here you are examining on cross examination. Your cross examination must be confined to matters brought out on the direct examination. Nothing brought out on that. If you want to make this your own witness you have the option of doing so. At the present status of the matter the objection will be sustained because it is improper cross examination. You can make him your own witness, but you can't prove a matter on cross examination—you can't introduce a matter for the first time on cross examination. You may make him your own witness.

Mr. Morris: Well, then, I will ask Mr. Rogers to return, or to remain, and after the noon recess to bring the materials that we have asked for, the documentary evidence in support of his testimony.

Mr. Lutz: That is to say, you intend making him your own witness for the purpose stated?

[fol. 128] Mr. Morris: I will determine that when I take up rebuttal.

Mr. Morris is directed to issue a subpœna for records, in order that its contents may be determined by the court.

Mr. Lutz: I will say, further, we are called upon in this case to know whether we are personally indebted to Mr. Rude or not on the matters alleged in the bill. We are not charged with anything about Manufacturers Trust Company stock. I submit it is departing all issues to go into that at all, or to permit anything thus far about it at all. We were not called upon to go into this.

After further colloquy, the court to Mr. Morris: "He has told you all about it. I think you have had enough of that."

The Witness (volunteering): "Well, Mr. Morris, you asked me a question, I believe, as to whether Mr. Rude had ever notified us that there were some difficulties between him and Buchhalter. I believe I answered you no.

The Court: Do you want to correct your testimony?

The Witness: I want to correct it, yes.

The Court: Just make the statement.

The Witness: Here is a letter received by Mr. Dawson, I see he acknowledged it in this matter dated January 20, 1930, wherein Mr. Rude——

By Mr. Morris:

Q. Now, just a minute.

Mr. Lutz: I would like to see it. I think I inquired about that.

The Witness: I know the question was asked me, and I wanted to correct it.

Mr. Morris: Well, may it please your Honor, this relates to transactions in 1930, which I didn't interrogate the witness about. I think it is immaterial and move it be stricken.

Mr. Lutz: I think it is very material indeed. I shall ask to have it marked as an exhibit and offer it in evidence.

Mr. Morris: I object because it is not proper redirect examination. I don't know whether it is original or re-
[fol. 129] direct. The letter that he has volunteered, which he has presented, is dated January, 1930.

The Court: It has not been offered yet.

Mr. Morris: I am through with the witness for the present.

Redirect examination.

By Mr. Lutz:

The witness is shown Defendants' Exhibit 13, and asked to identify it.

A. That is a letter from Mr. Rude.

Then witness states that he cannot swear to Mr. Rude's signature.

Mr. Lutz: Well, I will refrain from offering it at this time.

Witness is excused until two o'clock.

Mr. Dorsey asks that instructions to Mr. Rogers be made definite.

Mr. Morris states that he will make out a list.

JOSEPH BUCHHALTER, one of the defendants, was next sworn and testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he has lived in Denver for about thirty-five years; has been acquainted with the plaintiff Rude for eighteen or twenty years last past. Asked generally respecting the relationship of himself and Mr. Rude in the pulp and paper mill matter to August 29, 1929, witness states that Mr. Rude had invested in the old Colorado Pulp and Paper Company about $61,000; that in the early part of June, 1929, witness had thirty odd thousand dollars invested; that Mr. Rude asked witness to put up the balance of the money "if he would enter into a contract * * * It was around the early part of June when Mr. Rude asked me if I would put up the balance necessary for him to enter into a contract with Mr. Max Bronstine to purchase the mill at a receiver's sale. I told him that I would as much as I possibly can, and he entered into that contract, and I put up about $29,000 additional money to fulfill the agreement that he entered with Max Bronstine," making a total investment for witness of approximately [fol. 130] $59,000; that as before stated, Mr. Rude's total investment was approximately $61,000; that such figures represented their respective investments up to the time that certain funds were drawn down from the bank; that Messrs. Rude and Max Bronstine were purchasers at the receiver's sale, title being taken in the name of Bronstine and Rude; that the interests of both Rude and Buchhalter were carried in Rude's name until August 29, 1929. Witness thinks the property was acquired through receiver's sale in the early part of June, but that the deed might not have been received until July; that possession was taken in the early part of July, Mr. Bronstine assuming personal charge; that Mr. Rude was not able to take possession; "that is where the argument came in."

Q. Will you state what his relations were, so far as you know, transpiring in your presence or revealed by Mr. Rude, of the relations with Mr. Bronstine after the joint acquisition of the mill property.

A. Mr. Rude came over to see me daily. One day he complained that Mr. Bronstine didn't put the account in the Denver National Bank where he put it, and that he put it in the United States National. The next day he came over and said he wanted his brother to take the charge as manager, and Mr. Bronstine wouldn't put his brother in. The next day he wanted a gentleman by the name of Weiler.

Objected to by Mr. Morris as incompetent, irrelevant and immaterial.

Mr. Lutz: We pleaded the acrimonious condition that arose between Mr. Rude and Mr. Bronstine, and that he changed and transferred his holdings.

Objection overruled.

Exception reserved.

"A few days later he told me that he asked Mr. Bronstine to put Mr. Weiler to work, and Mr. Bronstine refused. Then he came in and told me that he wanted the insurance given to his friends, Mr. Spiegelman and Joe Silversmith, and Mr. Bronstine refused to give them the insurance, he gave it to Mr. Greenblatt. * * * This thing was continuing constantly from day to day until August 28th. Mr. Rude came over and said that he had an awful fight with Mr. Bronstine. * * * He said that he had an idea in mind that after the argument he had with Mr. Bronstine, [fol. 131] that Mr. Bronstine was going to ask a partition suit. * * * He asked me to get Mr. Silverstein on the phone, wanted to see him that night." This was about 7:30 to 8:00 o'clock at the Roosevelt Hotel in Denver, and that witness advised Rude he didn't think Silverstein wanted to be bothered at night; that thereupon, Rude requested that Mr. Rosner, a partner of Mr. Silverstein, be gotten on the telephone, which was done, and Mr. Rude personally asked Mr. Rosner to come to the hotel right away, which Rosner did; that after the latter's arrival, Mr. Rude related the troubles that he was having with Max Bronstine, and stated that he thought the best way to protect their interests "would be to put a mortgage on there, in case that Mr. Bronstine would ask for a partition suit, it was his idea that he couldn't get it."

Objected to by Mr. Morris as incompetent, irrelevant and immaterial and as tending to contradict and vary the terms

and conditions of written documents which had been introduced in evidence.

Objection overruled. Exception reserved.

Witness (continuing): "Mr. Rude said that if a mortgage was put on, that if Mr. Bronstine was going to ask for a partition suit, he couldn't get it unless the mortgage was paid off, and that would cloud the title where it would take time for the mortgagee to be served and so on. Mr. Rosner advised us against it, didn't think that that was the solution; that such would not solve the problem, and told us to see Mr. Silverstein in the morning. We met. Mr. Rude calling me in the morning, and we had breakfast and we went up to Silverstein's office." That was about 9:30 or 10:00 o'clock A. M. "Mr. Rude again stated his ideas of putting a mortgage on the property. Mr. Silverstein at that time called in Mr. Blount, asked him about his opinion, and after spending about an hour or an hour and a half they all advised us not to do it. Mr. Rude said to me, 'Let's walk up to Mr. Rosenbaum's office,' so we walked up to Mr. Rosenbaum's office." That this was right from Mr. Silverstein's office on August 29, 1929, about 11:00 o'clock in the morning; that upon arriving at Mr. Rosenbaum's office with Mr. Rude, Mr. Rude again stated his troubles about Mr. Bronstine, "and stated that he had a right to do that, because he didn't treat him right so far as the insurance and all that. Mr. Rosenbaum advised us against it. He [fol. 132] said however, 'I want you to look up the law,' Mr. Rude said, 'whether a partition suit must notify a mortgagee in order to get a partition suit,' and we left there from Mr. Rosenbaum's office, had lunch, and later Mr. Rude called up Mr. Rosenbaum and asked him about the law on that, and Mr. Rosenbaum thought that he would have to notify the mortgagee;" that Mr. Rude stated to witness what Rosenbaum had said after this telephone conversation; that Rude called Rosenbaum in the presence of witness; that Rude said Rosenbaum advised that a mortgagee would have to be notified. "Later Mr. Rude insisted that we go back to Silverstein and have that drawn, because it was his idea that it was correct, regardless of whether the lawyers agreed with us or not. We went up to Silverstein's office." That this was about two o'clock P. M. on August 29, 1929; that there were there present, Mr.

Rosner, Mr. Silverstein, Mr. Rude and the witness, and that "Mr. Rude continually stated that he wanted that mortgage on regardless of the opinions of the attorneys, and he didn't think he was hurting anybody; he was just protecting his own interest, and that Mr. Bronstine had mistreated him in every way."

Q. Was there any discussion, Mr. Buchhalter, about various amounts for which this mortgage was to be given, or who was to give the mortgage?

A. We talked about $125,000 and $150,000 and we talked who was to give the mortgage, and finally Mr. Rude stated he couldn't give a mortgage because he makes a statement to Dun and Bradstreet every year, and it would go against his credit.

That the matter was discussed both ways, "until it was settled that I was to give the mortgage."

Objection by Mr. Morris.

Objection overruled. Exception reserved.

Witness (continuing): "When we drew the mortgage Mr. Rude stated, 'You draw a mortgage for $75,000 on one quarter, and then you go out and get another mortgage for $75,000 on the other quarter.' "

Q. What was said in arriving at the amount of $75,000?

A. There wasn't anything in particular said, excepting that—Mr. Rude stated that he wanted it to be big enough [fol. 133] so we could get our money out if the partition suit was asked and the mortgage was paid off.

Q. Well, what was the amount of the mortgage as actually put on, and the note as actually given?

A. When Mr. Rude sta-ted to draw the mortgage it was for $75,000. When Mr. Silverstein started to draw it, he changed it. He says, "Now, make that for $67,500.-

Witness stated that the arrangement of putting a mortgage on the remaining quarter for a like amount was never carried out because negotiations for a sale were immediately started and it looked as though the property were going to be sold.

Witness is here shown Plaintiff's Exhibit D and states that it is the note and trust deed to which he has referred;

that is, the one that was signed and executed by him, the witness, on August 29, 1929, in Mr. Silverstein's office under the circumstances stated, and that he delivered these papers to Mr. Rude.

Q. What, if anything, was said at that time in relation to this matter?

A. When I signed that note, Mr. Silverstein stated to Mr. Rude, "You better give him a letter showing that this will never be used against him," and I asked Mr. Rude for the letter, and he says, "Now, you know that we have been doing business for a long time, and I don't want to give you a letter in case they make me swear that this was not a real sale. I said to Mr. Rude, "Now, you are the only man in the world that I would give a note like this, and I am giving you on the sole condition that you are not to enforce it against me or any one of my family."

Objected to by Mr. Morris, and motion to strike on the ground that it is incompetent, irrelevant and immaterial and because it tends to vary the terms and conditions of documentary evidence. Objection overruled. Exception reserved.

Witness (continuing): "Mr. Rude assured me that I would never have to worry about that, and he says, 'Now go out and tell the world that you bought me out. Tell everybody you meet. We will drive down and record the paper, and stop at the mill. We will tell everybody at the mill that you have bought me out, and that you have placed a mortgage on that,' which we did, and the negotiations I finally started——"

[fol. 134] Witness states that there was a deed made to him at the same time by Mr. Rude for both quarter interests, one such quarter interest being the portion theretofore belonging to the witness in the name of Mr. Rude. "The entire interest was in Mr. Rude's name until August 29th, and then the entire interest was transferred to me. Mr. Rude stated that I could negotiate the deal while he was away."

Q. Under what circumstances, if any, was it arranged that he should return this note and mortgage to you?

A. If it had not answered the purpose he was not going to use it at all.

Q. What purpose was that?

A. For the purpose of forcing the thing to a sale, and if it came to a partition suit.

Q. In any event, he promised to return it to you sooner or later?

A. Yes, sir.

Q. Well, what, if anything, did he say about its return to you, or about its use against you, Mr. Buchhalter?

A. He says I don't have to worry about that; it will never be used against me. That was at the time at Mr. Silverstein's office. I think I have stated that.

Q. What, if anything, did he say about the return of it to you, or destruction of it?

A. It would be returned to me if it didn't answer the purpose. If it answered the purpose it would automatically be destroyed.

Witness states that the deal known as the Binstock deal was finally negotiated; that about September 4th negotiations were started by Mr. Block bringing a proposition in writing to the witness and to Mr. Rude; that this time, about the 3rd or 4th of September, is fixed by the witness because it was only three or four days after the date of the mortgage; that there were various discussions and conversations with Mr. Rude in Mr. Block's presence about the proposition. "One of the discussions was when they offered us $19,000 in cash and half of the inventory, and Mr. Rude objected to selling out on that basis"; that this discusion was in the early part of September 1929, anywhere from the 5th to the 10th of that month.

[fol. 135] Q. Did he state or not at that time that he didn't want bonds for his share?

A. He didn't want to sell out for that little cash. He said he didn't want to sell out for that little cash, and he didn't want to accept bonds that would draw less than seven per cent interest.

"I told Mr. Rude that if I was to give him all the cash in the deal, would that be fair. 'No,' he said, 'that wouldn't be fair. That wouldn't be fair to you.'" That this conversation took place in the Roosevelt Hotel and that Rude said: "You go ahead and make the deal. I won't stand in the way of the deal."

The Court: This was after the mortgage was given?
Mr. Lutz: Yes, your Honor.

Witness (continuing): "This was about two weeks after the mortgage. Mr. Rude left town and negotiations had been continued. No, I want to correct myself. At that time I told Mr. Block that we won't accept that, in the presence of Mr. Rude; that we will not accept that proposition unless he pays $10,000 more cash. Mr. Block remarked to Mr. Rude and myself that 'He can't give it to you. That is all he has got, and that is all you can get.' Mr. Rude left town several days later, and the negotiations kept continuing from day to day. Finally I got a better contract out of Mr. Binstock.

Q. Let me ask you on this occasion of which you spoke, did Mr. Rude say anything to you about wanting a note from you for six months or a year's time?

A. Yes, he said he would take a note from me for six months or a year, and for me to take those bonds. I told him, "So far as a note from me, you will never get it," in the presence of Mr. Block, Mr. Rude and myself.

Q. You told him that you wouldn't agree to that?

A. Never.

"Mr. Rude later left town, and instructed me to go ahead with the sale and try to make the best deal I possibly can, and try to stick to the $10,000"; that negotiations respecting the deal continued; that after Rude's departure, the latter continuously wired and wrote, 'How are you getting along with Binstock's deal?' "

[fol. 136] Witness is here shown Defendants' Exhibit 14 and identifies it as a telegram from Mr. Rude, dated October 11, 1929. It is offered and received in evidence without objection, and reads: It is dated New York, October 11, 1929:

"Joseph Buchhalter, Roosevelt Hotel, Denver:

Not getting further particulars about Beck's accounting and anxious to know how soon can expect money through sale if deal closed with Binstock Shall I come through Denver Am needing money to pay for heavy purchases therefore anxious to know how soon can expect money through sale Please answer tonight Don't forget to fast and pray for me too Regards I. Rude."

That witness communicated with Mr. Rude as to the progress of the Binstock deal while the latter was in New York. "Mr. Rude called me on the telephone about October 16th and wanted to know how about the deal. It was long distance about eight o'clock at night or eight-thirty. I told him that that was the very best deal that we could make, and if we didn't make this deal we were going to lose it altogether, and the only way that I would be satisfied to go through with this deal is that we divide the proceeds as our interest appeared." That this was in relation to the deal that actually went through; that Mr. Rude said: "Why Joe, I need money very bad, and I am not going to stand in the way of the deal. Go ahead and finish the deal;" and that the same was closed and the money coming from the transaction was put in the bank some time in November. That witness telegraphed Rude to come to Denver, that "the money is ready," and that the latter arrived in Denver on Monday, November 18th, in the morning; that witness met Rude at the Roosevelt Hotel and had breakfast with Mr. Rude at Waldman's restaurant, and that Rude said: "Let's go down and drawn down the money and divide the proceeds." "I said to Mr. Rude, 'We are not going to draw down a dollar, as I promised Mr. Silverstein that we wouldn't drawn any money down until we arranged the attorney fees with him;' " that this conversation was early in the morning; that witness advised Rude in further detail about the deal as soon as he arrived in Denver, and that when advised, Rude "wanted to go down and divide the proceeds, so we walked to Mr. Silverstein's office. As we came to the Equitable Building Mr. Rude said, 'You better go up there yourself. I think you can do better with [fol. 137] them in getting them down on the fees than I can, and I will call you on the telephone and see how you are progressing.' I was there about an hour and a half, arguing about the fees;" that this was what Mr. Rude asked him to do. "Mr. Rude called me on the telephone while I was in Mr. Silverstein's office, and asked me how I was getting along. I stated I wasn't progressing very far, he better come over. He came over. We argued for about an hour and a half; Mr. Rude and myself with Mr. Silverstein. That was in the morning. We didn't get down to a definite figure as far as the attorney fees were concerned. We went to have lunch. We came back, and we argued again for

about an hour and a half or two hours. Mr. Rosner was there and Mr. Silverstein and Mr. Rude and myself, and finally Mr. Silverstein stated that he would make the fees $15,000, $5,000 down and $10,000 to be paid for two notes of $5,000 each for six months. That was agreed upon.'' That all the parties concerned said that that would be all right, and that the next day an agreement respecting the attorney's fees was signed by the witness and Mr. Rude with Mr. Silverstein's firm to such effect; that this signing was on the 19th of November, 1929; that further discussion proceeded with Mr. Rude and the witness and they did some figuring in respect to the $28,000 in the bank in escrow; that this was ''right in Silverstein's office just in the hallway there, and he would have to advance $5,000 to Mr. Silverstein. I said that that would leave about $23,000. He says, 'Yes, that is right.' I said, 'Well, I won't have practically any money out of this at all. I am owing to the bank for large amounts, in round figures about $11,500.' We went down to the bank, Mr. Rude and myself. We asked Mr. Rogers to get the escrow papers out. I walked up with Mr. Rude to the discount window while Mr. Rogers was getting the papers out, and asked him to get my notes out, what I owed; I was going to pay him. Mr. Rogers made out the checks. I think the notes amounted to about $6400, and I paid $5100 for stock that I bought for Mr. Rude that he loaned me, and Mr. Rude—then he made out the check, Mr. Rogers, for sixteen thousand and some odd dollars.'' That such check was made out to Rude and Buchhalter and that witness endorsed the check over to Mr. Rude and made an appointment with him to meet that night to figure up their respective interests in the bonds.

Q. While you were at the bank or at any other time, did [fol. 138] you promise to pay Mr. Rude the sum of fifty-nine thousand and some odd dollars, as mentioned in this suit, or any other sum?

A. Never a word mentioned about that. * * * He asked me to ask Mr. Rogers whether there would be any extra charge if we left the bonds there for a day or two until we figured up our respective interests. Mr. Rogers said there wouldn't be any extra charge.

That all this was said and done in Mr. Rude's presence.

Q. Do you owe Mr. Rude any money?

A. Don't owe him a dime.

Q. Did you ever promise to pay him anything on account of anything involved in this suit?

A. No, sir.

Q. Did you state to him at the bank or elsewhere, that you would agree that he might have a lien on the bonds in the bank?

A. Never heard the word.

Q. Were you asked for such a thing?

A. No, sir.

Q. Did you tell him you would do such a thing?

A. No, sir.

Q. Was such a subject ever discussed?

A. Never mentioned.

Witness then states that he never made any promise to pay Mr. Rude any sum of money the next morning. "From the bank we made an appointment to meet at night to figure out our respective interests in the bonds. We started figuring until Mr. Rude suggested to have the girl call Mr. Block and let him figure out." That that was on the night of November 18, 1929; that Mr. Rude called Mr. Block on the telephone and Mr. Block came. "He spent about three hours. Mr. Rude took out everything that he had invested. No. I showed him that he had invested $61,000. I brought out all the receipts that I had invested, which amounted to approximately $59,000 or a few hundred dollars less."

Objected to by Mr. Morris because the receipts would be the best evidence.

Objection overruled. Exception reserved.

[fol. 139] Witness (continuing): "And Mr. Block checked all these things, and finally figured up how much Rude's interest in the bonds were, and how much my interest in the bonds." That this figuring was done at the request of Mr. Rude, and that Mr. Rude stated to Mr. Block in witness' presence, that the reason he wanted these figures was because he (Rude) wanted to know how much each one had.

Q. Did or did not Mr. Rude speak as to the correctness of the figures after they were computed and shown to him?

A. It was all agreed, as far as Mr. Rude and myself, excepting Mr. Rude told Block that being we lost money in the deal, that he thought that he was entitled, not legally, but morally, to some of the proceeds made in the Myers Pulp

& Paper Company mill. Mr. Block then got into an argument with Mr. Rude.

That the meeting shortly adjourned. "We left that night and we were to meet the next day to go down to get the bonds. The next day I was subpœnaed as a witness in the Barth estate case, and I didn't get to see Mr. Rude until the day after, and he told me to go up to Mr. Rosenbaum's office, that he left some figures that he corrected. I came up to Mr. Rosenbaum's office and Mr. Rosenbaum showed me figures that Rude dictated to him."

Objection by Mr. Morris because this last was not in the presence of Mr. Rude.

Mr. Lutz: It was at Rude's request.
The Court: Objection sustained.

Exception reserved.

That the next morning, November 19th, about 11 o'clock, witness and Mr. Rude went up to Mr. Silverstein's office to give him the $5000 as agreed, and that this was done.

Q. How was the payment made?
A. When Mr. Rude made the check out he made the check payable to me, and I immediately asked him, "What is the idea of that?" and, "Oh," he says, "I have something in mind," and Mr. Silverstein objected to having the check made out that way. Mr. Rosner called his attention to it. He says, "You might some time say it was a loan." So we marked it right in Mr. Rude's presence that this check is [fol. 140] paid in payment of attorney fees $5000 for Mr. Rude and Mr. Buchhalter.
Q. You heard Mr. Rude testify, did you not, that this $5000 was a loan to you?
A. That is the first time I heard it.
Q. Did you ask him for any loan?
—. Why no, that was the money that was figured at the bank for him to give before we ever went down.

Witness states that he never heard of this matter being a loan to him before Mr. Rude's testimony; that on the occasion last stated, an agreement was signed by the firm of Blount, Silverstein & Rosner, which is shown to witness as Defendants' Exhibit 15, which he identifies as being the

agreement in question, respecting the attorneys fees; that it bears Mr. Rude's signature and his own.

Defendants' Exhibit 15 is offered and received in evidence.

That witness had five or six subsequent discussions with Mr. Rude respecting the transaction in suit; "that it was a continuous argument."

Q. Did he ever tell you what grievance he had or claimed against you in any of these conversations?
A. He insisted that I buy his bonds.

That Rude never made any other claim or professed any other grievance against witness.

Respecting the fight had by witness at the pulp and paper mill, witness states, "Mr. Rude came over to the hotel, and stated he didn't think we were getting action fast enough on the sale;" that this was in the early part of September, 1929, "and he advised me to go out there and take possession, being that the title was now in my name, 'but,' he says, 'you better be protected,' because he understands from people that he talked to that they are liable to get into a fight." That pursuant to this, witness went out to the mill on this Monday morning early in September for the purpose of taking possession, and got into a fight.

Witness states that he knows the signature of the plaintiff Rude, and identifies the plaintiff's signature to Defendants' Exhibit 13, (a letter written by Mr. Rude to the First National Bank under date of January 20, 1930). That wit- [fol. 141] ness was present during the discussion between Messrs. Rude and Block respecting a commission on the Binstock deal; that Block presented to Mr. Rude and the witness a bill for $2500; that this was in the Roosevelt Hotel in the latter part of November, 1929; that "Mr. Rude stated that was too much money, and that he would consent to give him $500.00 now and $500.00 when we get back some money from the receivership;" that there was about an hour's discussion concerning this matter between Mr. Rude and Mr. Block, and that later Rude asked witness to pay Block $500, stating that he, Rude, was short of funds at the then present time, but that Rude gave witness a written order to pay Block $500 commission and that he, Rude, would pay the witness $250 for his half interest. That pursuant to this,

witness gave Mr. Block $500, but that Mr. Rude has never paid his one-half, or $250; that witness had advised Mr. Rude the amount of collateral possessed by witness and in the possession of the First National Bank, and told him that it consisted only of 200 shares of Cities Service stock and a $1000 Straus bond; that Mr. Rude was advised of all this when this collateral was withdrawn from the bank.

Q. Did you promise him at that time or any other time to sell that collateral and raise the cash and pay to him?

A. No sir.

Q. Did you or not, promise him to sell $25,000 of the bonds in the bank for the purpose of raising cash and paying him?

A. No sir.

Q. Did you have any conversation of that kind or involving any such thing?

A. Mr. Rude stated that he would like to borrow between $15,000 and $25,000 on his bonds at that time. I suggested that he try the First National Bank, and he stated to me that he didn't want to try the First National Bank because they turned him down with a loan of about $4000.00 a year and a half or two years ago, and I told him that I think I know the party that would loan him $15,000 or $20,000 on his bonds.

That such was all there was to any proposition of that kind.

Q. You said something about a recited consideration in a letter given by you to Mr. Rude of $7500 in connection with [fol. 142] this $67,500 note. What was the conversation with reference to that?

A. Well, Mr. Rude insisted on having the letter to show that it was a sale, to make believe that $7500 was really paid in, that it was a real sale.

Q. Did you ever promise to pay such a sum?

A. Never promised, never paid a dollar.

Defendants' Exhibit 13 is here offered and received in evidence without objection.

At this juncture Mr. WILLIAM F. ROGERS, Vice President of the First National Bank, was recalled for further examination.

Examination by Mr. Dorsey:

Witness repeats that the First National Bank was acting as escrow agent for Messrs. Rude and Buchhalter on November 18, 1929, and that the escrow instructions are contained in a document signed by Mr. Buchhalter and by a telegram sent to the Denver National Bank by Mr. Rude; that the bank possessed a copy of such telegram in its files, giving to the bank Mr. Rude's instructions; that on November 18, 1929, the bank held, subject to the escrow, $22,950.56; that prior to that the total amount was $28,080.56; that this was represented by cashier's check; that in addition to the cash there were bonds of the par value of $92,500; that on November 16th, $5130 was taken out of the escrow to pay for 40 shares of Manufacturers Trust, which was issued in the name of Isadore Rude, and on the afternoon of the 18th of November there was withdrawn the sum of $6585.22, which was credited or paid off the notes of Buchhalter amounting to $6550 and accrued interest, and that a cashier's check was then drawn jointly to Mr. Rude and Mr. Buchhalter for the balance, amounting to $16,365.34. Witness further states that the bank possesses the joint receipt of Messrs. Buchhalter and Rude for the sum total of $28,080.56.

Cross-examination.

By Mr. Morris:

Witness states that he disbursed part of the cash about two days prior to the time that Mr. Rude arrived and came into the bank; that the sum so disbursed amounted to $5130; that this was paid out on Mr. Buchhalter's oral order and [fol. 143] was used to purchase 40 shares of Manufacturers Trust stock; that the same was bought by the bank through a broker; that some days elapsed before the stock certificate was received.

Q. Well, Mr. Rude made no request for you to purchase that stock, or to pay out the $5130, did he?

A. No, but it was confirmed to him that we had done it.

Witness states that according to the receipts in his possession, Mr. Buchhalter's securities were returned to him upon the latter's payment of his obligation to the bank;

that witness had nothing to do with that matter personally, and did not see the securities himself. Witness states that such securities consisted, according to his records, of 200 shares of Cities Service Stock, a $1000 Park Avenue Apartment Building bond, which is known as a Straus issue, and also an assignment against the escrow. Witness volunteers the statement that Mr. Rude was tied in with the agreement between Buchhalter and Binstock through a copy of a telegram by Rude to the Denver National Bank, given to the First National Bank.

JOSEPH BUCHHALTER resumes the stand for cross-examination:

Cross-examination.

By Mr. Morris:

Witness states that he is forty years of age, has engaged in the real estate business for ten or twelve years last past, also has owned and operated hotels; that he has been in different lines of business; that he has done some promoting of enterprises; that at one time he was president of the Colorado Pulp & Paper Company, but did not manage that company; that he was president of such company until Mr. Morris (inquiring counsel) started a suit for a receiver. Witness also states that at one time he was connected with the Home Public Market of Denver; that he started it and built it up; that he is still interested in that enterprise as a stockholder; that at one time he owned the Congress Hotel at Pueblo, Colorado.

Q. You were also in the Adams Hotel in Denver, weren't you?

A. Yes sir.

Q. And your possession there was terminated by receivership?

[fol. 144] Mr. Lutz: I object to that, your Honor. What has that to do with the issues in this case? That is just pettifogging.

The Court: I think the question is objectionable.

Witness states that he is interested in the leasehold of the St. James Hotel; not in the operation of the hotel, but

in the physical property. Witness denies that he was ever in the Motion Picture business and states that he had some stock in a moving picture theatre in Denver, but was in no manner connected with the operation thereof. Asked respecting when the paper mill was acquired by Messrs. Rude and Bronstine, witness thinks it was some time in June, 1929, but that the final deed might have been given later, and that possession was taken some time in July.

Q. Now, I will ask you whether you are sure of the dates of the acquisition and possession of the paper mill from the Master by Mr. Rude and Mr. Bronstine, as to the dates that you testified to this morning, as you are on all the other dates which you gave in your testimony on direct examination this morning.

Objected to by Mr. Lutz as most improper, and incompetent.

Objection overruled. Exception reserved.

Witness replies that he cannot be as sure of those dates because Mr. Rude and Mr. Bronstine were handling the matter, and that he, the witness, was not; that witness might have been present when possession was given, deed delivered and the property turned over to Messrs. Rude and Bronstine; that he was out to Brighton, where this transpired, a great many times and that there were several meetings in regard to the particular matter of getting possession and a deed to the property; that witness did not see the deed; that he was not present at its delivery; that witness remembers when possession was taken of the mill by Bronstine and Rude; that these two were at the mill taking inventory, but he does not know whether this was the day they got possession or several days or a week later; that George W. Beck, the receiver, was also there. Witness fixes the exact date of his telephone conversation to Mr. Rude, between Denver and New York, as October 16th, about 8:30 o'clock at night.

Q. You are positive of the date?

[fol. 145] A. Do you want to see the date? Here is the bill for it.

Witness further states that Mr. Rude called him, the witness, and charged the call to the witness.

Witness states that he cannot state the exact date of closing the deal with Binstock because there were several deals with Binstock; that the money was deposited by the latter in the early part of November, which he thinks was about the 6th or 8th of that month; that witness was present at the bank; that there was a first deposit previously of $19,000, but this must have been a week or ten days before the final amount went in, "because we had to take the inventory to find out how much the balance was;" that this $19,000 item might have been deposited several weeks before, "because they had to get the bonds printed, and they had to take the inventory of the mill." Repeats that the final balance was put in escrow in the bank around the 6th or 8th of November. States that Mr. Silverstein prepared the deeds conveying the property from plaintiff Rude to the witness, and that he thinks they were typewritten rather than on forms; that the deeds were delivered by witness to Rude, that is, the warranty deeds, of which there were two, each being for a one-fourth interest, embracing all of the property acquired in the Master's sale, including property in both Adams and Gilpin Counties, Colorado; that witness did not read the deeds, but was present when Mr. Rude signed them; that witness and Rude took the deeds to Brighton, Colorado, for record, first stopping en route at the mill; that Rude and witness went together to the County Clerk and Recorder's office; that witness paid the fees; that the deeds were mailed back to Mr. Silverstein's office in accordance with instructions written thereon; that witness did not have personal possession nor custody of the deeds; that a week or ten days later they were returned from the Recorder's office to Mr. Silverstein; that Mr. Silverstein was the attorney for both witness and Rude in this transaction. Witness states that it is not a fact that he ever told Mr. Rude that Bronstine might bring a partition suit to divide the property; that Rude stated he would like to sell for cash because he was in need of money. States that on the 30th of September, 1929, Rude loaned the witness $4500 by discounting a note.

[fol. 146] Q. I didn't ask you that, Mr. Buchhalter. Isn't it a fact that on the 30th of September, 1929, Mr. Rude loaned you $4500.00 in cash at your request?

The Court: Answer yes or no.

A. There were several times. I don't remember whether that was the date. There were several times during that month that Mr. Rude loaned me money.

Q. And didn't you tell him at that time that you were hard up, and that you needed money?

A. Why, I was. I was putting up $29,000.00.

The Court: Answer the question and we will get along much better.

A. I was.

Q. And you told him you needed the money, and he loaned it to you?

A. Yes, sir.

Q. And isn't it a fact that at that time you asked him to take your check dated ahead, and that he should hold the check for a few days?

A. No, sir.

Q. You didn't make any statement to that effect?

A. No, sir.

Q. And isn't it a fact that a few days thereafter you asked him to return your check to you, and requested him to take your note for ninety days at six per cent?

Mr. Lutz: I object.

The Court: The objection will be sustained. This is all immaterial, Mr. Morris. This is taking altogether longer than is necessary.

Mr. Morris: That is true, may it please your Honor, on those very things. Counsel went into unimportant transactions as to what was done on particular hours of the day.

The Court: Only matters concerning this lawsuit. I have tried to be liberal here, but you push the court too far. We have to finish this case today, or else it is going to go over indefinitely.

[fol. 147] Mr. Morris: Well, I don't see how it is possible to finish today, your Honor. We have a number of witnesses on rebuttal. They have covered a tremendous territory.

The Court: No, I think you are the only one. We have tried this case once before. You are going into a great many matters that are wholly extraneous and will not be considered by the court.

Mr. Morris: Well, your Honor, this witness is extremely adroit.

The Court: I have given you considerable latitude, but you try to take advantage of it. It is wholly unnecessary.

Q. Now, Mr. Buchhalter, it is true that Mr. Rude entrusted to you forty shares of the corporate stock of the Manufacturers Trust Company, did he not?

Objected to by Mr. Lutz as extraneous matter.

Objection sustained. Exception reserved.

The witness is handed Plaintiff's Exhibit O, and identifies his signature and handwriting; states that the date was changed from the 15th to the 16th to correct an error; that he saw Mr. Rude on that date. This exhibit is offered in evidence. It is objected to by Mr. Lutz only on the ground that it appertains to Manufacturers stock, with which this case is not concerned.

Objection sustained. Exception reserved.

Q. Mr. Buchhalter, isn't it a fact that the amount of money which Mr. Rude turned over to you in connection with the Colorado Pulp & Paper Company was computed at the time that the note and deed of trust was prepared?

A. He never turned a dollar over to me.

Witness states that he never at any time sought to get Mr. Rude to invest money or to advance money on the paper mill deal; that Mr. Rude himself asked the privilege of getting in on the deal; that Rude did not make payments or turn this money over to the witness; that some of it was paid direct to the First National Bank.

Q. Yes, at your request, didn't he?

A. At my request. At the note's request. There was a note out on bonds we had up as collateral.

[fol. 148] Q. And that money was applied on a note which you had signed at the First National Bank?

A. As well as Mr. Rude.

Witness again states that Rude owned $61,000 of bonds (that is, the bonds of the old Colorado Pulp & Paper Company), which represented the principal amount of Rude's investment. Witness states that no interest was ever computed on the basis of Mr. Rude's $61,000 investment; that

there was never any discussion about interest and that Rude did not ever say to the witness that the interest amounted to $6,000 or $7,000. Denies again that Rude advanced anything at the suggestion or request of the witness; that advances were made to cover obligations on which both were liable. States again that Rude never at any time said to the witness, either when the mortgage was being prepared and the note and trust deed were being given, that he, Rude, was entitled to between $6,000 and $7,000 interest; that no such statement was ever made; that such a matter could have been very easily figured.

Q. Do you mean to say there was no statement made as to the amount of interest he was entitled to in these investments?

A. No, sir.

Witness states that he was a witness in his own behalf at a Justice of the Peace trial at Brighton, September last.

Objected to by Mr. Lutz on the ground that it is another side issue.

Objection sustained. Exception reserved.

Q. Mr. Buchhalter, I will ask you whether or not you testified at that time, on or about the 30th day of September, 1929, at Brighton, in substance, that you had bought Mr. Rude out, and that you were the owner of all interest in the mill which he had theretofore had.

Objected to by Mr. Lutz as incompetent, irrelevant and immaterial.

Objection sustained. Exception reserved.

Witness states that the only mortgage ever given by himself to Mr. Rude was the one in question for $67,500; that in the telephone conversation from Denver to New York, he re-
[fol. 149] quested the latter to send this note to Mr. Silverstein, and Mr. Rude stated he was sending the note to the Denver National Bank with instructions, and that witness went later to the Denver National Bank and saw the letter Mr. Rude wrote to that bank and observed therefrom that the bank was instructed to deliver the note in payment of $40,000 cash.

Q. Then you reported that to Mr. Silverstein?

A. I don't remember whether I reported it, or he reported it to me.

Witness states that he cannot tell the exact date that he went to the Denver National Bank on this matter; that it might have been after the telephone call; that after reading Rude's letter to the Denver National Bank, several telegrams were sent to Mr. Rude. Witness then states that he does not think he read the letter; that instead, he read a telegram at the First National Bank; that he does not remember specifically, that he might have read the letter, it didn't make any difference.

Witness is shown Plaintiff's Exhibit J. He identifies it as a telegram sent by himself to Mr. Rude.

Q. You knew that if any partition suit was brought, that Mr. Rude was a non-resident, and that he would have to be served in Texas, if he was not here, by publication, did you not?

A. That is just the point.

That prior to the giving of the mortgage, all the property was in Rude's name; that thereafter all of it was in the name of the witness; that part of the discussion between Rude and the witness with relation to the feared partition suit was that Rude, as mortgagee and a non-resident, would have to be made a party; states that the relations between himself and Rude were very friendly when they were at the First National Bank; that Rude on that occasion stopped at the Roosevelt Hotel in Denver, in which witness was interested; that there has been no quarrel between himself and Rude. That after drawing funds down from the First National Bank, Rude and the witness went to Mr. Silverstein's office to make a payment of $5,000 on account of the latter's bill for attorneys fees. This was done in conformity with the agreement of the day before. That the evening of the day [fol. 150] of having drawn down the funds from the bank, witness did not call Mr. Block in at the Roosevelt Hotel, but that Mr. Rude called him.

Q. And it is a fact, is it not, that Mr. Rude then repeated that he wanted his part in cash in accordance with his former statement.

A. Never mentioned a word. * * * Nothing mentioned in cash at all. We figured up Mr. Block's figures and settled without a word.

Q. And if Mr. Block testified to that, he has testified falsely?

A. If he has, he has testified falsely.

Q. And is it not a fact that at that time you stated to Mr. Rude in Mr. Block's presence that you had a Mr. Hurd, or that he should see a Mr. Hurd to whom he could negotiate a sale of $25,000.00 of the bonds to pay Mr. Rude, and that you asked Mr. Block to negotiate that sale?

A. There wasn't a word mentioned that night about anything.

Q. You mean to state that that was not mentioned either at that time or any other time?

A. It might have been three, four or five days later.

Q. Well, now, do you mean to tell this court that no statement was made by you in the presence of Mr. Rude and Mr. Block to the effect that he should sell $25,000.00 worth of bonds in order to pay Mr. Rude's $25,000.00 in cash?

A. Not that night, not a word.

Q. Well, was it mentioned the next night?

A. Two or three nights later Mr. Rude had an argument with me.

Q. Well, when did Mr. Rude leave for Texas?

A. Why, he was there all week that week, because we had four or five arguments that week.

Q. Well, do you know what day he left?

A. No, I don't know what day he left, but I know he was there all week.

Q. You are positive he remained there during the Wednesday, Thursday, Friday and Saturday of that week?

A. Three or four days, yes, I am pretty sure that he was there three or four days that week.

Q. Well, now, isn't it a fact that that statement was made by you to Mr. Block in Mr. Rude's presence?

A. No, Mr. Rude wanted to get——

Q. I am asking you whether that statement was made?

[fol. 151] A. Yes, that is right.

Q. Mr. Buchhalter, isn't it a fact that at that time or about that time you told Mr. Block that he should come down and that you wanted to see him later; you would tell him where he could sell $25,000 worth of bonds so that you could pay Mr. Rude all cash?

A. When?

Q. Any time during that week?
A. Never.

Redirect examination.

By Mr. Lutz:

Q. Will you state what the discussion was, if any, about the sale of $25,000 of bonds?

A. Mr. Rude said that he would like to sell some of these bonds, and I told him that I think I can get a man that will buy $25,000 of his bonds. That was three or four days after we figured up.

Witness states that Mr. Block, Mr. Rude and the witness were present at this conversation.

Q. The statement was that you told Mr. Rude that you thought you could tell him where he could sell $25,000 worth of bonds?

A. Yes, sir.

HARRY S. SILVERSTEIN, one of the defendants called as a defense witness, testified as follows:

Direct examination.

By Mr. Lutz:

States that he has been a practicing attorney at law in Denver, Colorado, since 1896; that he is a member of the firm of Blount, Silverstein & Rosner; that he is one of the defendants in this case; that he has heard substantially all of the testimony in the case and that he is familiar with the pleadings thereof; that he is acquainted with the plaintiff Rude and the defendant Buchhalter, both of whom he has known for a number of years and both of whom he represented in the pulp mill transaction; that he has represented Mr. Rude in transactions other than the pulp mill deal; that he represented both parties respecting the pulp mill transaction from the year 1925 on; that this litigation is still being continued in the state courts; that at the present time there are four cases in the Supreme Court [fol. 152] of the State of Colorado involving that matter, in which witness represents Mr. Buchhalter, and witness,

along with Mr. Charles Rosenbaum, represents Mr. Rude; that one of the cases so pending involves the confirmation of the sale of the pulp mill to Bronstine and Rude, which case is still pending and undetermined.

Witness recalls that on the morning of August 29, 1929, he had an interview with Mr. Rude and Buchhalter in the presence of Mr. Rosner, and, for a time, Mr. Blount.

Q. Will you state what that interview or conversation with the parties was at that time and their errand.

A. On that date, August 29, 1929, fairly early in the morning, that is, early for me, about nine-thirty, Mr. Rude and Mr. Buchhalter and Mr. Rosner came into the office together, and one of the three—I won't say which one—they all three told me about it together—reported as to an interview they had had the night before with Mr. Rosner, and the discussion which took place, and repeated—Mr. Rude stated that he was not getting along well with Mr. Bronstine. He had talked to me prior thereto about some of the same matters; that he was fussing with Mr. Bronstine about where the insurance was to be placed, about some employees at the mill; that Mr. Bronstine was excluding him from any participation in the management; complaining about some waste paper contracts that had not been gathered in.

Q. All this was the conversation of August 29th?

A. On the 29th of August, and that he was tired of it, and he was anxious to have Mr. Bronstine buy the interest of Mr. Buchhalter and Mr. Rude, and they were discussing also the fear that they had that, due to these disagreements between Mr. Bronstine and Mr. Rude, that a partition suit would be brought, and that they had discussed with Mr. Rosner the night before the effect of a mortgage, whether that would put them in a more advantageous position in the event a partition suit would be brought. I advised them that I didn't think it would make a particle of difference; called his attention to the fact that he had a written contract with Mr. Bronstine by which, in the event of a purchase, they were to convey, and advised him strongly against it. My recollection is that Mr. Blount didn't come into the interview until after Mr. Rude and Mr. Buchhalter had left the [fol. 153] office. That is my best recollection of it. We had a considerable discussion there. Then they left and came back, and what was—I don't recollect just how long. They

came back that morning I am sure, and insisted on the idea of putting a mortgage on there as a protection to them against Mr. Bronstine.

Q. You called Mr. Blount in on their second visit?

A. Yes, I went to Mr. Blount's door and opened it, and called him in, and stated the proposition to him, and in their presence, and he advised very strongly against the execution of any instrument of that kind, and concurred in my opinion then expressed, that it would not make any difference.

Q. What, specifically, if anything, did they say was their purpose in putting on this mortgage?

A. It was with the idea of putting the title in Mr. Buchhalter's name, because Mr. Rude had been unable to finally conclude negotiations for a sale, and he thought Mr. Buchhalter would be better able to do so, or anyway that it might conduce to that result.

Q. Well, proceed and state what was actually, if anything, done about the matter.

A. Well, nothing was done at that time. Later on in the afternoon, I think it was after lunch, Mr. Rude and Mr. Buchhalter came back to the office, and I think Mr. Buchhalter stated a fresh grievance against Mr. Bronstine. I think he stated something about Mr. Macaskill, the manager of the mill, making trips East, and making contracts for paper at a price that was not giving them any profit. Mr. Rude's statement to me was that that was being done merely to enable the mill to use up waste paper here that Mr. Grimes was getting the benefit of, and not the mill, and he thought that was not fair, and he insisted that the title should be given to Mr. Buchhalter, and Mr. Buchhalter would be better able to make a deal.

Q. Was there any discussion as to the amounts at that time of the mortgage, or who should give the mortgage?

A. There had been a discussion in the morning as to Mr. Rude putting on the mortgage, and he stated he couldn't do that because, being in business, he had to make a statement, and it wouldn't be good for his business to show an indebtedness, and suggested that Mr. Buchhalter should give him the mortgage.

[fol. 154] Q. How or what was said about it—in arriving at the amount of the note and mortgage?

A. They were in the office practically all of the afternoon, discussing the situation at the mill, and I advised them—they asked whether there would be anything wrong in giving the mortgage. I said, "Nothing wrong in it. It won't do you any good, and it won't do Mr. Bronstine any harm, and the only possible advantage you could gain by it would be that if there is a mortgage given to Mr. Rude and the title is in Mr. Buchhalter's name, it would give you a little more time to arrange your finances if you had to bid in a partition sale." I advised them that afternoon that if a partition suit was brought, it would be a suit in equity; that the chancellor would have full power to adjust all equities between them; that the mere fact of a mortgage being put on there, whether for any real consideration or not, would all be adjusted; that they might have a partition sale subject to the mortgage, in which event they would still be in the position of merely having security on their half interest, and both of them said, "Well, we want to go ahead anyhow. The mere question of time is sufficient, and we want the title in Mr. Buchhalter's name, and want a mortgage given to Mr. Rude." They discussed the amount, and the amount—some larger amount had been mentioned in the morning, and I advised them that if there was any mortgage it should be for some amount commensurate with the value of the property, and not any excessive amount. Mr. Rude stated that he thought a quarter interest in that mill was reasonably worth $75,000 on the basis of the entire mill being worth about $300,000, and that was the consideration I think named in the deed, and the mortgage back was given for $67,500.

Q. What was said, if anything, with respect to any actual consideration passing between the parties?

A. When the mortgages were drawn I suggested—at the time the mortgages were drawn and the deed I suggested to Mr. Rude that he was under this contract with Mr. Bronstine, and he would have to carry it out, and that it would be advisable for him to write to Mr. Bronstine, notifying him to that effect, even though he had conveyed title to Mr. Buchhalter, and I advised him then that unless he did that, Mr. Bronstine might be of the opinion that the deed was made merely to prevent a sale, and he should put himself in the clear on that; that Mr. Bronstine, if he did try [fol. 155] to prevent a sale, would have a cause of action

against him for damages for breach of contract, and he agreed to the writing of that letter. At that time I also suggested to both of them that Mr. Rude should write a letter to Mr. Buchhalter, stating that the note and mortgage would be returned to him or cancelled in the event he effected its purpose, that is, a deal was made, or in the event of no partition suit, and Mr. Rude stated that he and Joe had had dealings for years and trusted each other implicitly, and there was no need of doing that. I said to Mr. Buchhalter, "Well, you are taking a chance on that." Mr. Buchhalter said, "I am perfectly willing, and Mr. Rude is the only man I would trust with an instrument of that kind." Mr. Rude stated at that time that he need not worry; in case a deal was made or no partition suit brought, he would cancel the note and it would never be used.

Q. Was there anything said about it not being used by Mr. Rude?

A. Yes, Mr. Rude stated, "Well, in any event it will never be used against you."

Witness states that he was the draftsman of the note and trust deed in suit, whereupon witness is shown Plaintiff's Exhibit D, and states that that is the note and trust deed to which he has just referred; that there was not, on the occasion in question, to-wit, August 29, 1929, any computation of Mr. Rude's interest in the business, of $61,000 and interest; that such was never mentioned. Witness states that his firm has a garnishment against the bonds now in escrow in the First National Bank; that he, the witness, nor his firm, was never notified by Mr. Rude or any one in his behalf, of any lien or claim of lien by Mr. Rude. Witness, continuing, "Mr. Rude and Mr. Charles Rosenbaum I think came into the office—I can't be sure of the date without refreshing my recollection from my diary, but I think some time in November, and Mr. Rude then stated that Mr. Rosenbaum was acting as his attorney, and that he claimed that Mr. Buchhalter had violated an agreement with him to the effect that Mr. Buchhalter was to give him all the cash received in the Binstock deal, or that Mr. Rude have all the cash received in the Binstock deal.

[fol. 156] Q. Mr. Rude said that to you, that that was his complaint against Mr. Buchhalter?

A. Yes, sir.

Witness states that there was never any discussion on more than one day of August 29, 1929, relative to the issuance of a note and mortgage and the transfer; that there was never any such discussion before or after that date.

Witness (continuing): "I would like to add one statement, Mr. Lutz, as I recollect it now, as to what occurred on the 29th of August."

Mr. Morris here interrupts with an objection to the testimony of the witness and moves the same be striken because it is incompetent, irrelevant and immaterial and tending to vary the force and effect of written instruments.

Objection overruled. Exception reserved.

Witness (continuing): "I mentioned in conversation the fact that the letter was to be drawn and be signed by Mr. Rude and addressed to Mr. Buchhalter, and it was arranged that day that Mr. Rude would call at the office the next day to sign such a letter, and that was done. At the same time, on August 29th, I mentioned the fact that Mr. Rude should leave a signed release of that deed of trust, or signed request for a release, and he said he would do that. That was to be prepared later;" that some time later such a release was prepared. "I think I went over to the Roosevelt Hotel where Mr. Rude and Mr. Buchhalter were, and that Mr. Rude signed the request over there, and at that time I asked him to leave the note also in case a deal was put through, to facilitate the transfer, and he said he had sent the note to Dallas, and would mail it."

Q. Thereafter or some time later it was sent to you upon your telegraphic request?

A. No, the note was not sent to me. The note was sent to the Denver National Bank.

Respecting the payment of $5000 to the witness's law firm that has several times been mentioned in evidence, witness states: "On November 18, 1929, I spent a considerable portion of that day with Mr. Rude and Mr. Buchhalter on the question of the attorneys' fees coming to us in all [fol. 157] the pulp mill cases. (We went over the bills which had been rendered to Mr. Rude and to Mr. Buchhalter, covering a period of several years and a great deal of litigation. * * *) In any event, after considerable discussion, I stated that I would accept the sum of $15,000

in full of the services rendered for certain bills that had been rendered at that time for the balance, if they would pay the sum of $5000 in cash and the balance within short periods, and both stated that that was acceptable. The next day they came in and paid the $5000. I had drawn up, prepared a statement, or had the stenographer prepare the statement on the typewriter, carrying out what had been arranged the day before, with the approval thereof to be signed by Mr. Rude and Mr. Buchhalter, and they signed it. Mr. Rude either drew a check or had a check, Mr. Rude and Mr. Buchhalter there, Mr. Rosner also, and somebody or he drew the check payable to the order of Mr. Buchhalter—I don't know whether I remarked, or Mr. Rosner, but it was remarked as to why it was being made out to Mr. Buchhalter. Mr. Rude said something about having his own reasons for it, and I objected, that the check should express on it what it was for, and the endorsement was made on that check in Mr. Rude's presence, while he was sitting there at the table across from me."

Cross-examination.

By Mr. Morris:

Witness states that he was a director of the Colorado Pulp & Paper Company and may at some time have been vice president; that he had one share of stock in that company; that in the event the pulp mill should be financially successful, there was an arrangement whereby there would be a bonus of stock from Mr. Buchhalter to several persons; that witness thinks in such last mentioned event, 5000 shares of common stock of that company was coming to his firm, but not to himself personally, and that his firm likewise held two of the bonds that were issued by that company, one of which was paid; that these bonds were for $1000 each and were received for legal services; that Messrs. Davis & Wallbank, Denver attorneys, along with witness, organized the Colorado Pulp & Paper Company; that witness is unable to recall, without seeing the minute book, whether Mr. Rude was one of the original directors; thinks that Mr. Rude had no active participation in the [fol. 158] management, being absent in Texas most of the time. Witness states that he is familiar with the nature of the title to the mill; that he participated in the pro-

ceedings in the District Court of Adams County and he prepared or assisted in the preparation of the orders relative to the sale of the mill, but did not attend the attempted sales of that property; that there were numerous efforts to sell it; that he was not present when the mill was finally sold; that his partner, Mr. Blount, was present on that occasion; witness is not sure whether he was present when title to the property was obtained by Messrs. Bronstine and Rude, that is, when the deed was passed, but thinks he was present in court when the form was approved by the court; does not know the exact date when possession was actually taken; that inventory was being taken for some time before possession was technically turned over; that witness had nothing to do with the organization of the new company that took it over after the Master's sale.

Witness is shown Defendants' Exhibit 15. He states that he drew it and that it bears his signature. Witness is next interrogated respecting recital in that exhibit. He states that Van Cise & Robinson represented Mr. Bronstine and witness' firm represented Mr. Rude in the sale and its confirmation, and that a joint bill was rendered by Van Cise & Robinson and witness' firm for this entire service. Repeats that a joint bill was rendered and adjustments made with Van Cise & Robinson. Witness states that he cannot say whether Mr. Buchhalter or Mr. Rude, or both, directed him to prepare the two deeds conveying the Rude interest in the mill to Buchhalter; states that he acted pursuant to the directions and requests of both; that he acted pursuant to the request of both Rude and Buchhalter in preparing the note and deed of Trust. Witness states that he was instructed to put the title in Mr. Buchhalter's name.

Q. And you prepared two deeds. Was that your suggestion or the suggeston of Mr. Buchhalter?

A. Well, I have forgotten now what the occasion of the two deeds. I think when the stenographer prepared them the deeds were for a quarter interest, and she understood a quarter interest, and she prepared carbon copies so late in the afternoon my recollection is that they just said well, all right, let them sign both deeds. That would convey the half.

Witness states that he was acting for both parties; re-
[fol. 159] peats that all papers to consummate the trans-

fer of the mortgage or deed of trust were prepared under his direction; that he does not think that he told Messrs. Buchhalter and Rude what to do with the papers; that they knew what to do with them; that he gave no advice as to the legal effect of the deeds. "I advised them as to the effect of the transactions so far as Mr. Bronstine was concerned and so far as Mr. Rude's contract with Mr. Bronstine." That he stated to them that it would make no difference to Mr. Bronstine and that it would not affect his interests one way or the other; that he simply told Rude and Buchhalter that it would give them a little more time.

Q. Now, you testified on direct examination that the mortgage or deed of trust and the note was to be redelivered by Mr. Rude to Mr. Buchhalter, if I understood you correctly, if there was no partition suit?

A. Or in the event of a sale.

Q. In the event of a sale they should be redelivered.

A. Or torn up.

Q. Now, in what event, Mr. Silverstein, was the note and deed of trust to become effective according to your advice to the parties thereto?

A. I didn't give any advice as to its becoming effective. They stated it would not be used.

Q. You understood, did you not, when you were advising these parties, that these instruments, namely, the note and deed of trust, were never to become effective?

A. The note and deed of trust never to be as a note or foreclosure.

Q. They didn't mean what they said, according to your advice to the parties; is that correct?

A. They did not.

Q. There were no conditions of any kind or character under which the note or the deed of trust were ever to be enforced by the holder against the maker; is that correct?

A. Never to be enforced.

Q. Now, Mr. Silverstein, I will ask you whether or not it is a fact that you did advise against a mortgage which represented the total investment which both parties had made in the property, namely, a mortgage for approximately $130,000.

[fol. 160] A. I advised against the whole proposition all the time.

Q. Well, can you answer that question, whether you advised against that kind of a mortgage.

A. That question didn't specifically come up, as to my advice on that one particular proposition.

Witness states that he knew that Mr. Rude was parting with the legal title in the paper mill by the execution and delivery of the deeds, and the final result was that he retained nothing to show his interest therein, except the note and the deed of trust, but that Rude stated that he trusted Buchhalter fully and Mr. Buchhalter trusted him.

Q. You knew that Mr. Rude didn't intend to make Mr. Buchhalter a present of his interest in the mill, didn't you?

Objected to by Mr. Lutz. Objection sustained.
Exception reserved.

Q. Well, Mr. Silverstein, did you intend to prepare instruments in the shape of a note and deed of trust that had no validity?

Objected to by Mr. Lutz. Objection sustained.
Exception reserved.

Witness states that he advised both Messrs. Rude and Buchhalter as to the force and effect of the note and deed of trust; that he told them exactly the effect it would have in a court of equity in a partition suit, but that was all he was asked about and such was the thing in their minds. States that he thinks Mr. Morrison of the Denver National Bank read a telegram to the witness over the phone, rather than a letter. Is not sure whether he heard Mr. Morrison's testimony at the beginning of the trial to the effect that he, Morrison, had read to witness, Exhibit 9 over the phone, or Exhibit I-9, but recalls having received one message over the phone about a communication from Mr. Rude.

Q. Yes, and you recollect that Mr. Morrison informed you at that time that Mr. Rude's instruction to the Denver National Bank was that he should have at least $40,000 in cash? Was that communicated to you?

Objected to by Mr. Lutz, as not cross-examination.
Objection sustained. Exception reserved.

[fol. 161] Witness states that he did not confer with the officers of the Denver National Bank after Mr. Morrison had called him on the telephone. He states that his recollection is not clear as to whether he framed a telegram which the Denver National Bank was to send to Mr. Rude with reference to the escrow, but that such might have taken place. States that he sent a telegram to Mr. Rude, requesting that the latter forward the note for 67,500; that his purpose in so doing was to comply with the escrow contract, in order that the Buchhalter-Binstock deal might be closed. Witness states that he may have been informed on or about October 14, 1929, that the note had been sent to the Denver National Bank; will not say that he didn't have such information.

Q. Mr. Silverstein, did you take up with any agent or officer of the Denver National Bank the manner in which its telegram of October 17th to Mr. Rude in New York should be framed?

Objected to by Mr. Lutz, as not cross-examination, and immaterial.

Objection sustained. Exception reserved.

Q. I will ask you whether it is not a fact that the telegram which the Denever National Bank sent to Mr. Rude was first submitted to you before it was sent.

Objected to by Mr. Lutz, as immaterial, and not cross-examination.

Objection sustained. Exception reserved.

The Court: Counsel may make this witness his own witness if he cares to.

Mr. Morris: I don't think I care to.

The Court: All right. Let the record so show.

Mr. Morris: That is all.

Mr. Lutz: We rest, may it please your Honor.

Rebuttal by the Plaintiff

Ernest J. Tracy, a witness called on behalf of the plaintiff, testified as follows:

[fol. 162] Direct examination.

By Mr. Morris:

Witness states that he has lived in Denver all his life and is an assistant cashier of the Denver National Bank, in charge of the Credit Department, having been connected with that bank for about eleven years, and is engaged in making investigations as to the character, financial responsibility and business ability of credit risks, it being a part of his duty to investigate the character and reputation of people with whom the bank has or may *may* have business dealings.

Q. I will ask you whether you are familiar, Mr. Tracy, with the reputation of one Joseph Buchhalter for truth and veracity in the community where he resides and where you reside.

Objected to by Mr. Lutz as incompetent, irrelevant and immaterial.

The Court to Mr. Morris: You haven't sufficiently qualified him to answer the question.

Mr. Morris proceeds to further examine, and the witness states, "I have had no occasion, Mr. Morris, to make any specific investigation concerning Mr. Buchhalter, that is, directly. I have had occasion to investigate certain things with which Mr. Buchhalter has been indirectly connected."

Witness states that he does not know Mr. Buchhalter personally.

Q. Well, you know concerning his reputation in this community, do you not?

Objected to by Mr. Lutz.

The Court to the Witness: You were investigating some business concern?

The Witness: Yes.

The Court: The objection will be sustained if that is all the qualifications.

Q. Well, Mr. Tracy, I will ask you whether you have talked with a number of people concerning the reputation and character of Joseph Buchhalter for truth and veracity?

Mr. Lutz: Well, I will object to that, your Honor. That [fol. 163] would not establish a qualification. Supposing he did talk with a number of people; he might talk with two enemies and come here to bespeak a countrywide reputation.

Objection overruled. Exception reserved.

A. Yes, sir, I have.

Witness states that he could not state, off hand, with approximately how many people he had talked; repeats again that he couldn't state with how many people he may have discussed the matter, because it extends over a period of years, "because I belong to so many associations of credit men." Witness states that he occupies an official position with two credit men's associations, being a director of the Retail Credit Men's Association and having been recently elected a director of the Rocky Mountain Association of Credit men; that the purpose of these organizations is "mostly checking the paying habits of individuals." He states that in his work with credit associations, he has discussed with members the reputation of Joseph Buchhalter in the community for truth and veracity.

Q. From such investigation state whether or not you know his general standing and reputation in this community for truth and veracity.

Mr. Lutz: Now, that is calling for the witness' opinion on his own qualifications, your Honor. He said a number. He might have talked to two people.

Objection overruled. Exception reserved.
Witness answers in the affirmative.

The Court: State whether that reputation is good or bad.
The Witness: It is bad.

Cross-examination.

By Mr. Lutz:

The witness states that he came to court to testify at the request of Mr. Rude, who is and has been a depositor at his bank, the Denver National Bank.

Q. Now, with whom have you talked, and when, about Mr. Buchhalter's reputation?

A. That is a question I can't answer. I can't mention any specific time or any particular individuals.

Q. You can't tell anybody at all?

[fol. 164] A. No, sir.

Q. You don't know whether there were two or whether there were twenty persons?

A. Oh, yes, I do. There was about a dozen of us.

Q. Name some please.

A. You are asking me to do something that is contrary to the code of credit ethics.

The Court: You may answer the question, Mr. Tracy.

A. I can't.

Q. Why not? Don't you remember, or don't you want to violate your code of ethics?

A. I don't remember.

Q. Anybody you have ever talked to about Mr. Buchhalter?

A. With one exception.

Witness states that the exception was a man by the name of Olsen, with the Kohler-McLister Paint Company. He states further that he has not had occasion to make inquiries about Mr. Buchhalter for over a year; that Mr. Buchhalter does not do business at his bank; that he does not know Mr. Olsen's relations with Mr. Buchhalter, whether he was a personal enemy or not; "We were discussing the non-payment of bills. It was at a credit men's dinner."

Q. Then you found your opinion of truth and veracity on the non-payment of a bill, do you?

A. Partly. That is one of the elements.

Q. Is that all you discussed on that occasion about Mr. Buchhalter?

A. About Mr. Buchhalter, yes, sir.

Mr. Lutz: I think the testimony should be stricken, founded on the non-payment of bills.

Objection overruled. Exception reserved.

CHARLES B. MYERS, a witness called on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Morris:

Witness states that he resides in Denver, is acquainted [fol. 165] with defendant Joseph Buchhalter, having known him since 1925; that he met Mr. Buchhalter some time during September, 1929, on Curtis Street, Denver, between Seventeenth and Eighteenth Streets; that Mr. Buchhalter then had an office at the Rivoli Theatre Building, and that a conversation ensued between himself and Buchhalter; that witness' wife, Mrs. Myers, was in the automobile parked at the curb where the conversation took place.

Q. And will you state, please, what was stated at that time and place.

A. Mr. Buchhalter told me——

Objected to by Mr. Lutz, as no foundation had been laid or subject matter introduced to authorize the admission of the proposed conversation or give opportunity to make objections.

Witness then states that the conversation concerned Mr. Buchhalter's dealings with Mr. Rude.

Q. Please state, Mr. Myers, what was said at that time and place by Mr. Buchhalter.

Objected to by Mr. Lutz on the ground that no foundation has been laid; that it is possible that witness might be an impeaching witness if Mr. Buchhalter had been asked some questions; that otherwise it could not be material, and certainly did not constitute rebuttal. If it could be used at all it should be introduced as a part of the main case, and that it was objectional from any one of the standpoints made.

Objection sustained.

Q. Well, Mr. Myers, did you have any conversation at that time with Mr. Buchhalter concerning his ownership with reference to the mill that formerly belonged to the Colorado Pulp & Paper Company.

Objected to by Mr. Lutz for the reasons last before above assigned.

Objection sustained.

The Court: There was no impeaching question put to Mr. Buchhalter on which to impeach Mr. Buchhalter's testimony.

Mr. Morris: No, it is not an impeaching matter, your Honor. It simply goes to conduct inconsistent——

[fol. 166] The Court: I do not consider chance statements that a man may make either seriously or facetiously on the street to a man that is not interested or a perfect stranger. It is not fair. I will sustain the objection. No impeaching question was put to Mr. Buchhalter about it.

Mr. Morris: Now, may it please your Honor, I didn't think we would reach rebuttal quite so soon. Now we have some rebuttal of Mr. Rude, but I think I can shorten it if I have time to go over the matter with Mr Rude.

The Court: You will have to proceed now. Put on some one else.

Whereupon Mr. RUDE, the plaintiff, resumes the stand in him own behalf in rebuttal.

Direct examination.

By Mr. Morris:

Witness states that he was in court the day preceding and heard Mr. Rosner's testimony, and denies that he called Mr. Rosner by telephone on the evening of August 28, 1929; that he does not remember having had any dealings with Mr. Rosner, and states that he had no occasion to call Mr. Rosner by telephone in August of 1929. Remembers this because he had no business with Mr. Rosner; that his business dealings theretofore had been with Mr. Silverstein.

Q. Did you see Mr. Rosner at the Roosevelt Hotel.

A. I don't remember ever seeing him there at all.

Witness denies that he ever had any conversation with Mr. Rosner about putting a mortgage for $130,000 on the mill property; denies that he ever stated to either Mr.

Rosner or Mr. Buchhalter that he had any idea of putting on a mortgage on account of a partition suit; that Mr. Buchhalter was the first to call to his attention the fact that a partition suit might be brought; that Buchhalter stated to the witness that he had talked with Mr. Rosner about it, and that Mr. Buchhalter said such would be all right; that there was nothing illegal about it; that the idea was Mr. Buchhalter's to have a mortgage put on the property.

The Witness: You mean the mortgage for the $130,000 or the mortgage for the——

[fol. 167] Q. Any amount.

A. Mr. Buchhalter's all the time. It was his idea, yes.

Q. Did you ever suggest to him that a mortgage should be put on to complicate matters if there were a partition suit?

A. No, sir. I didn't understand any such law. Didn't know anything about it.

Witness denies Mr. Rosner's testimony to the effect that witness had stated he was going to put a mortgage on the property and give a mortgage and note to Mr. Buchhalter, regardless of the opinion of his firm in the matter, and states that such a matter was never discussed, and that he never mentioned to Mr. Buchhalter or Mr. Rosner that he, the witness, would give Mr. Buchhalter a mortgage, because witness had the property in his own name anyway. Denies that he ever said anything to Mr. Rosner that he, the witness, might have to make a report to Dun and Bradstreet, because he was in active business, and such might hurt his credit if he gave a mortgage; denies that he ever made any proposal or had any intention of ever giving a mortgage; denies that Mr. Rosner ever stated to him that if a mortgage were given it would be purely fictitious paper; states that he never heard the word fictitious, until he heard it here in court; admits that he saw Mr. Rosner on the occation testified to by the latter, in the Cosmopolitan Hotel in January, 1930.

Q. At that time did you make any complaint to him relative to the amount of attorneys' fees which his firm was seeking to collect?

Objected to by Mr. Lutz. Objection sustained. Exception reserved.

Q. Mr. Rosner stated that you told him that you were going to give, or that you didn't care whether the note and mortgage were fictitious or not, or if you knew that they were, or whether he knew that they were, that you were going after Buchhalter just the same. Did you make a statement in substance and effect of that character?

A. No, sir. That was not discussed at all.

Witness denies that he ever made any statement to Rosner to the effect that the mortgage or note was not valid, and states the mortgage was not discussed at all that day.

Q. Well, now, please state, Mr. Rude, what the conversa- [fol. 168] tion was between you and Mr. Rosner in January of this year at the Cosmopolitan Hotel.

Objected to by Mr. Lutz unless it pertained to the issues in the case. The question is too broad. He has now denied what Mr. Rosner testified to, and we think that is all the law allows.

The Court: Objection overruled.

Mr. Lutz: Exception. This is rebuttal.

Witness then states that he said to Mr. Rosner on the occasion at the Cosmopolitan Hotel, "Mr. Buchhalter is trying to crook me, and since your firm represented us both, I am surprised Mr. Silverstein, who I thought was an honest man, would permit such a thing;" "and after we discussed it quite a while, he said, 'I didn't know anything about this transaction. You know I had nothing to do with it, except the time it was discussed about the legality of the mortgage for the amount in excess of what is coming to me.' The first thing he said, 'Now, let's have it understood right here that none of it will be used. Whatever I say or whatever you say will not be used.' He used the legal term, 'should not be used in court,' in other words, should be——

By Mr. Morris:

Q. Confidential?

A. Confidential communication, what he said to me, "so you can talk freely and I can talk freely," and among the things I told him that I heard the firm is going to be impeached for overcharging the fee. He said, "If they do

that I will either stay with them or go down with the firm," and then Mr. Block came in and I used these words. Morris (Block) I called down. Block was called town too. I called him. I said, "I called down Mr. Rosner among friends. I want to see these things will not go in court, and I believe Mr. Rosner is fair-minded, and he should straighten it out with Mr. Silverstein." Mr. Rosner left and he wanted me to see him the next morning in the office, and I said, "I believe there will be no need to go into court since I heard your side." Then I also told him at that time—I says, "I am in a peculiar predicament. Mr. Hornbein doesn't want to take my case—he is my lawyer—because Mr. Silverstein will be involved in it and they are [fol. 169] friends, and I should like to settle with you as to fees."

Objected to by Mr. Lutz.

The Court: He may answer.

Witness (continuing:) So I says, "Mr. Hornbein refuses to take my case because Mr. Silverstein will be connected with it, and he doesn't want to have to cross-examine him; that he would be one of the defendants," and I says, "I want to settle this fee with you whether I owe it or don't owe it, because I want Hornbein tor present me." He says, "You come down tomorrow morning." That was the following Sunday. I says, "For the purpose of settling with Mr. Silverstein. I am going to settle that bill although I don't owe it."

By the Court: What bill was this; attorney bill?

A. Yes. And Mr. Silverstein said, "I can't settle with you unless you settle with Buchhalter."

Witness states that this talk was not had at the Cosmopolitan, but took place the next morning.

The Court: Strike it all out except what occurred at the Cosmopolitan.

The witness then states that he heard the testimony of the defendant Buchhalter in this case.

The Court: We will have to take an adjournment at this point.

Trial resumed at ten o'clock A. M. November, 1, 1930.

Mr. Morris asks permission to put other witnesses on the stand, rather than immediately resuming with Mr. Rude.

R. W. HERSHEY, a witness called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Morris:

Witness states that he has lived in Denver about thirty-four years; was in the laundry business; has occupied an official position in the City and County of Denver, having been Manager of Safety and Excise for about seven years, [fol. 170] and as such, had charge of the police and fire forces of the City and County of Denver; that he ceased to be such official on or about the 15th of July, 1930.

Q. During the time that you were occupying that official position, did you learn of the general character and reputation of one Joseph Buchhalter?

Objected to by Mr. Lutz as having no place in the case as made; that the testimony of Mr. Buchhalter has not been contradicted or impeached in any manner; that no legal foundation exists to permit such testimony.

Objection overruled. Exception reserved.

A. I did.

Witness states that he has known Mr. Buchhalter's reputation for possibly ten or twelve years.

By the Court: Is his reputation good or bad, Mr. Hershey?

A. So far as I have heard, it is bad.

Cross-examination.

By Mr. Lutz:

Witness states that he has come to court to testify at the request of Mr. Rude, although Mr. Rude is not a friend of his particularly; that he only met him once or twice; denies that he was requested by any one else to come.

Q. You said you would be glad to come?
A. After he asked me that same question, and I answered it as I did, I said I would come.

Witness states that he does not know Mr. Buchhalter and does not recall ever having met him.

HENRY C. VAN SCHAACK, a witness called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Morris:

Mr. Lutz makes the same objection to the testimony of this witness as is made to the testimony of the witness last previous. The same is overruled.
Exception reserved.

Witness states that he resides in Denver, having lived in [fol. 171] that city for about twenty-five years last past, is in the real estate and insurance business; knows and has known the defendant Joseph Buchhalter for about seven years; that in the past year or two he has become acquainted with Buchhalter's reputation for truth and veracity from statements of others, and states that it is bad.

Cross-examination.

By Mr. Lutz:

Witness states that he has had two business deals with the defendant Buchhalter, one involving about $25,000 and the other involving about $50,000, and that his personal relations with Mr. Buchhalter in respect to those deals were eminently satisfactory. Witness states that he is connected with the Denver National Company, which belongs to the stockholders of the Denver National Bank.

Q. Who asked you to come over here, Mr. Van Schaack?
A. Mr. Rude.
Q. Anybody else?
A. I was asked to assist Mr. Rude by someone else. Mr. Rude asked me to come over.

Q. Who else asked you to come over here?
A. No one else except Mr. Rude and Mr. Morris.
A. Nobody else?
A. No, sir.
Q. Nobody else spoke to you about coming here as a character witness against Mr. Buchhalter?
A. I was asked to assist Mr. Rude if I could.
Q. Who asked you to assist Mr. Rude?
A. Mr. Bonfils.

Witness further states that Mr. Bonfils did not try to get him to appear as a witness in the September hearing of this case, and denies that he so stated to Mr. Buchhalter and denies that he stated to Mr. Buchhalter that his, the witness' only knowledge of Buchhalter's reputation was gathered from the Denver Post. The deals I had with Mr. Buchhalter were sales to him.

[fol. 172] Sam Levy, a witness called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Morris:

Witness states that he has lived in Denver for about seventeen years, is in the real estate business and manager of the Home Public Market, having been such for about two years.

Mr. Lutz makes the same objection to this testimony as made to previous character witnesses.
Objection overruled. Exception reserved.

That he knows Joseph Buchhalter and has been acquainted with him for about ten years; that he knows his general reputation in Denver with reference to truth and veracity; that he has discussed this reputation with numerous people, and that "it is not very good, I would say."

Cross-examination.

By Mr. Lutz:

Witness admits that he is personally not friendly with Mr. Buchhalter, but would hardly say that he was an enemy; that both Mr. Rude and his counsel, Mr. Morris,

requested the witness' presence as a character witness; denies that anybody else made such a request of him; admits that he has, during years past, borrowed money from Mr. Rude; admits that he knows on Joe Brooks, one Spector and one Sam Pello; denies that he stated to any of these persons that he was an enemy of Mr. Buchhalter; denies that he took one Henderson up to see Mr. Bonfils of the Denver Post, to ask the latter whether he would give Buchhalter adverse publicity in the event Henderson should start litigation against Buchhalter.

Mr. Morris offers to prove by one D. M. Waldman that the general reputation of Joseph Buchhalter in the community where he resides, for truth and veracity is bad.

Objection by Mr. Lutz.

Objection sustained. Exception reserved.

[fol. 173] GEORGE W. BECK, a witness called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Morris:

Witness states that he has lived in Denver for about twenty-three years and was receiver of the Colorado Pulp & Paper Company, appointed by the District Court of Adams County, Colorado; that he remained in possession, as receiver of the paper mill property until August 14, 1929, upon which date Receiver's Deed was turned over to Mr. Rosner, representing Max Bronstine and I. Rude; that this was about 4:30 o'clock in the afternoon of that day.

Q. Mr. Beck, during the summer of 1929 did you have any conversations with Mr. Joseph Buchhalter relative to the proposed sale of the paper mill property?

Objected to by Mr. Lutz as not being rebuttal, not being impeachment, and as not constituting even a part of the main case, and as incompetent and immaterial to the issues before the court.

The Court: Why is that important?

Mr. Morris: May it please your Honor, one of the issues in the case, and one that was emphasized by the defense was the confidence that was reposed in Rude by Buchhalter. I want to show what the real relationship was.

Objection sustained. Exception reserved.

Mr. Morris: I desire to prove by Mr. Beck that in the summer of 1929, when the question came up relative to the sale of the paper mill, that he had a conversation with Mr. Buchhalter wherein Mr. Buchhalter stated that he would transfer the securities pertaining to the mill to any purchaser that Mr. Beck might produce therefore, and that Mr. Beck asked Mr. Buchhalter how about Mr. Rude's interests to which Mr. Buchhalter reported that "Mr. Rude will do anything that I ask him to relative to the transfer of the interest."

Mr. Lutz: All of which is objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Morris: Exception.

No cross-examination.

[fol. 174] Moses Binstock, a witness called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Morris:

Witness states that he is a manufacurer of clothing, has lived in Denver some twenty odd years, knows and has known Joseph Buchhalter for several years; that witness made a contract with Buchhalter for the purchase of the paper mill of the Colorado Pulp & Paper Company, these negotiations starting the last of September, 1929; witness does not remember the exact date.

Q. State whether or not he made a proposition to you for the sale of his interest in the mill.

Objected to by Mr. Lutz, as having no relationship to this case; that the written contract between Buchhalter and Binstock is in evidence.

Objection sustained. Exception reserved.

Witness is shown Plaintiff's Exhibit G and identifies it as the contract between himself and Mr. Buchhalter, on October 10, 1929.

Q. State whether or not at that time you had, or shortly prior to that time you had a conversation with Mr. Buchhalter with reference to the amount of cash that he would have to *have to* pay for an interest which he stated was owned by Mr. Rude in the property.

Mr. Lutz: Objected to, your Honor. All their dealings were merged in that instrument; incompetent, irrelevant and immaterial, and not impeachment, and not rebuttal.

After extended colloquy between court and counsel this objection was sustained, and exception reserved.
Mr. Morris makes the following offer of proof:

We desire to prove by this witness that the defendant Buchhalter first made a proposition to him which was in effect the same proposition on which the contract was finally signed, namely, Exhibit G; that thereafter Mr. Buchhalter went to Mr. Binstock, the witness, and stated to him that he couldn't go through with the proposition; that Mr. Rude wanted all cash for his interest in the mill; that he would have to have at least $10,000 more cash than Mr. Binstock had argeed to pay, for the reason, as Buchhalter stated, that [fol. 175] Rude wanted all cash, and that he further stated that he had to pay Mr. Rude at least $40,000 cash in the deal.

Mr. Lutz: All of which we object to as incompetent, irrelevant and immaterial, not impeachment and not rebuttal, and besides that, the negotiations between third persons were merged in a written instrument.

Further colloquy between court and counsel.
Objection sustained. Exception reserved.

I. Rude, the plaintiff, was here recalled as a witness in his own behalf in rebuttal.

Direct examination.

By Mr. Morris:

Witness states that it is not true that Mr. Buchhalter put in $59,000 in cash in the bonds of the Colorado Pulp and Paper Company.

Q. State what Mr. Buchhalter told you with reference to what he put into the company, whereby he acquired his interest therein.

Mr. Lutz: I don't think that is the point. It fixes no time or anything of that kind. At one time he might have had $99,000, another time $59,000, or an intermediate sum.

Objection overruled. Exception reserved.
To which the witness answers:

A. To my knowledge he put in about $23,000 in cash, and he got some bonds from the American National Bank, about $21,000.

Q. What did he tell you as to the manner in which he acquired his interest in the property?

Mr. Lutz: I think that is wholly inadmissible. He admitted he had an interest. What difference does it make as to the manner in which he acquired it? The testimony so far is that this man and defendant Buchhalter each owned a one-quarter interest in the mill property. What difference does it make how or in what manner Buchhalter acquired it? That is not the issue in this case.

The Court: He had it when he started negotiations.

[fol. 176] Mr. Morris: I don't know which negotiations you mean. Mr. Rude was drawn into this matter several years before at the solicitation of Mr. Buchhalter. Mr. Rude put in cash. Mr. Buchhalter, as the testimony will show, put in what might be termed promoter's services. In other words, Mr. Rude's was cash, and Mr. Buchhalter's was wind.

The Court: Well, that doesn't make any difference. What difference does it make? He had the property when he started negotiations. He had his interest. That is not disputed.

Mr. Morris: This being an equity case, I think your Honor wants to get down to the very substance of the matter.

The Court: I do, but I don't want it all clouded with irrelevant matters.

Mr. Morris: This bears it out very distinctly. There is some dispute about the amount Mr. Rude was to receive. Mr. Buchhalter had disputed that. If Mr. Rude paid all cash and was solicited by Mr. Buchhalter and the company by certain promises at that time, it shows an equitable reason why Mr. Rude should have the money out that he put into the enterprise, and that is all he is claiming.

Objection sustained. Exception reserved.

Witness states that he gave $41,000 direct to Buchhalter by checks and sent $20,000 at his request to the First National Bank, making a total of $61,000.

Mr. Lutz: Your honor, I want to move to strike that answer (the one last above foregoing). It doesn't make any difference whether he gave money to Buchhalter or whether he gave it to the bank. There is a written agreement in evidence, introduced by themselves, to the effect that each of these men have a one-quarter interest in the mill property.

Objection overruled. Exception reserved.

Q. Now Mr. Rude, state what conversations you had with Mr. Buchhalter relative to those payments.

Mr. Lutz: May it please your Honor, now, this is another objection. That is direct again. This is not rebuttal.

The Court (addressing Mr. Morris): This is part of your [fol. 177] main case. We have tried this case twice under different sets of lawyers and we can't go over it all again. It is not rebuttal.

Objection sustained. Exception reserved.

Witness states that possession of the mill was obtained by himself and Mr. Bronstine, August 14, 1929.

Q. Now at that time did you have any bonds or security that belonged to Joseph Buchhalter?

Objected to by Mr. Lutz as having no place in rebuttal.

The Court: The record shows that this man Rude had some bonds, Buchhalter had some bonds, up to half of this

property. Then Rude joined with Bronstine, who had the other half and jointly they bid it in, that is, Rude and Bronstine. What difference does it make?

Mr. Morris: May it please your Honor, they have emphasized here and tried to make it appear to this court that Mr. Rude, without any written statement to Mr. Buchhalter, had in his possession all the interest that Mr. Buchhalter had for two months, namely, from the early part of June, as they make it appear, up to the time the paper mill was—the deeds were executed, or at the time that there was a written obligation given by Mr. Rude to Mr. Buchhalter. Now, we wish to show that Mr. Buchhalter held his own interest; that he didn't trust Mr. Rude with it, and that within about thirty-six hours after the bidding in of the mill they exacted from Mr. Rude a written statement as to what interest Buchhalter had, which is in evidence. They are trying to make it appear that Mr. Buchhalter trusted Mr. Rude for a period of two months, and hadn't a scrap of the pen to show for it. I wish to show that testimony is not true. That is Mr. Buchhalter's direct examination on defense. We certainly ought to be permitted to rebut it.

Mr. Lutz: Mr. Rude himself under my cross examination testified to the thing he wants to deny now. I read from page 46 of the testimony: "Did you give Mr. Buchhalter a writing showing that you were trustee for that quarter interest?" "Yes sir." "You did?" "Yes sir." "When did you give him such a writing?" "I gave it to him on August 15th I believe, if I am not mistaken." "But you acquired the property in June, didn't you?" This is Rude. [fol. 178] "May 14th. Mr. Buchhalter wasn't in the city." "But for a period of a couple of months you were his trustee for a quarter interest in this property, his having no written evidence of it at all, weren't you?" A. "Yes." "So you trusted him fully and he trusted you?" "Yes, sir." "That is the way you dealt together?" "Yes, sir." "With absolute confidence each in the other?" "Yes sir." Now he wants to show that he had no confidence in Buchhalter. I submit it is simply impeaching his own testimony if he is allowed to answer such questions. Besides that, it is not rebuttal.

Mr. Morris: Now, your Honor, I think Mr. Rude was confused as to the dates.

The Court: That is his testimony. You can't open up the same questions again. It is very clear from that it has been gone into once.

Mr. Morris: I think it has, but Mr. Buchhalter went into it on defense.

The Court: You can't keep going back and forth, and changing his testimony or correcting it.

Mr. Morris: We simply want to get at the truth of the matter. Mr. Beck's shows he never parted with possession. They were probably both mistaken. The result is that Mr. Buchhalter didn't trust Mr. Rude for thirty days.

The Court: If you care to take the witness stand we will be glad to have you, but we don't care to have you testify. Sustain the objection.

Mr. Morris: Save an exception. We offer to show by this witness that he did not have possession of the mill property or any interest of Mr. Buchhalter to exceed thirty-six hours.

Mr. Lutz: All of which is objected to for the reasons herein, and, further, that it is not true in fact. The sale was made June 14th.

The Court: Now, you are testifying. I don't like to have counsel state what the facts are. All right. Go ahead.

Witness denies that Mr. Buchhalter's testimony to the effect that witnesses had said the best way to protect their interests "would be to put a mortgage on there in case that Mr. Bronstine would ask for a partition suit, it was his idea that he couldn't get it."

[fol. 179] Q. Mr. Buchhalter further testified that you insisted that we, referring to him and you, have a mortgage drawn because it was your idea that it was correct regardless of whether the lawyers agreed "with us," as he stated, "or not." Did you make any such statement in substance or in form to Mr. Buchhalter or anyone else?

Mr. Lutz: I submit that is objectionable. Of course, I will concede now that Mr. Rude will deny anything that any witness said.

Whereupon, the court directs Mr. Morris to read the exact language from the record.

Witness denies Mr. Buchhalter's testimony to the effect that witness insisted that he and Buchhalter go back to Mr.

Silverstein and have the note and mortgage drawn because it was regarded by him as being correct, regardless of whether the lawyers agreed or not.

Q. He further stated that you continually stated that you wanted that mortgage on regardless of the opinions of the attorneys, and that you didn't think it was hurting anybody. Did you make such a statement in substance or form to him?

A. I did not.

Q. State whose idea it was to put the mortgage on.

Mr. Lutz: Now, your Honor, that is direct again. It is not rebuttal of anything. They both agreed.

Mr. Morris: I don't understand that rebuttal is a mere denial. I think Mr. Buchhalter has given his version, and Mr. Rude ought to be permitted to give his version.

The Court: He has been given his opportunity on two occasions when two separate counsel were representing him. I think you have had your opportunity. The objection will be sustained.

Exception reserved.

Q. Mr. Buchhalter, referring to you and himself, stated, "We talked about one hundred and twenty-five thousand and one hundred and fifty thousand, and we talked who was to give the mortgage, and finally Mr. Rude stated he couldn't give a mortgage because he makes a statement to [fol. 180] Dun's and Bradstreet's every year, and it would go against his credit." Did you make any such statement to him in substance or in form?

Objected to by Mr. Lutz, as having been inquired about on cross-examination at the first hearing and denied by the witness, and further, because it is immaterial, not rebuttal, and encumbering the record.

Objection sustained. Exception reserved.

Q. Mr. Rude, it was testified here by Mr. Buchhalter as follows: "When we drew the mortgage Mr. Rude stated, 'You draw a mortgage for $75,000.00 on one-quarter, and then you go out and get another mortgage for $75,000.00 on the other quarter.'" Did you make any such statement in substance or in form to Mr. Buchhalter?

A. I did not.

Q. Mr. Buchhalter testified that you stated that he should give you a letter for $7500.00 in cash, "because it will look funny to sell the thing without a dollar down. A business man doesn't do things that way." Did you make any statement in substance and in form with reference to it looking funny or with reference to selling a thing without a dollar down?

A. I did not.

Q. Mr. Buchhalter stated that you told him that you had been doing busienss for a long time, and that you didn't want to give him a letter in case they made you swear that it was not a real sale. Did you make any statement in substance or in form to that effect?

A. I did not.

Q. He further testified that you stated—no, that he stated to you that you were the only man in the world that he would give a note like this, referring to the note for $67,500.00, stating that, "I am giving you on the sole condition that you are not to enforce it against me or any one of my family." Did you make any statement in susbtance or in form to that effect?

A. I did not.

Q. He further stated that you said to him, "Now, go out and tell the world that you bought me out. Tell everybody you meet." Did you make any such statement to him?

A. I did not.

[fol. 181] Q. And that you further said that, "We will tell everybody at the mill that you bought me out, and that you placed a mortgage on that." Did you make any such statement to him?

A. I did not.

Q. He further testified that you stated that you would return the note if it didn't answer the purpose. Did you make any such statement to him?

A. I did not.

Q. He further testified that you stated that if it, referring to the note, answered the purpose it would be automatically destroyed. Did you make any such statement to him?

A. I did not.

Q. He further testified with reference to a conversation had between you and him and Morris Block that he, Buchhalter, told you that if you were to give him all cash in the

deal, would that *he* fair, and that you said, "No, that wouldn't be fair. That wouldn't be fair to you." Did you make any such statement in substance or effect to him?

A. I made the statement not in that way.

Q. Well, did you ever state that it would not be fair to him if he paid you all cash?

A. I said to him, "It is not a question of whether it is fair or not. I don't want any bonds."

Mr. Lutz: This is not rebuttal.

The Court: He has answered the question.

Q. Answer the question whether you made the statement in the way he testified?

A. No, I did not.

Q. He further testified with reference to a conversation at the Roosevelt Hotel between you and him to the effect that you stated to him, "You go ahead and make the deal. I won't stand in the way of the deal." Did you make any such statement to him?

A. No, sir.

Q. He also testified with reference to that same conversation with reference to giving a note to you, "So far as a note from me," referring to himself, "is concerned you will never get it." Did he make any such statement to you?

[fol. 182] A. He did not.

Q. He further testified with reference to a telephone conversation between Denver and New York at the time you were in New York and he was in Denver, and stated as follows: "I told him," referring to you, "that that was the very best deal we could make, and if we didn't make this deal we were going to lose it altogether, and that the only way I would be satisfied to go through with this deal is that we divide the proceeds as our interest appeared." He further testified that that referred to the Binstock deal and the deal that actually went through. Did you make any such statement in substance or form in the telephone conversation?

A. There was no such a conversation.

Q. He further testified to some telephone conversation, that you said, "Why, Joe, I need money very bad, and I am not going to stand in the way of a deal. Go ahead and finish the deal." Did you make any such statement in the telephone——

A. There was no such conversation at all.

Q. Now, Mr. Rude, I wish you would kindly state why you called Mr. Buchhalter up by telephone and what the telephone conversation was.

Objected to by Mr. Lutz as not being rebuttal.

Objection sustained.

Exception allowed, and Mr. Morris given an opportunity to make written offer of proof, which was in words and figures following, to-wit:

"Plaintiff offers to show by his testimony that the sole object and purpose of his communication with the defendant Joseph Buchhalter by long distance telephone from New York City to Denver on October 16th, 1929, was to explain to the said Buchhalter the reason that plaintiff had sent the note for Sixty-seven Thousand Five Hundred Dollars ($67,500.00) to the Denver National Bank of Denver.

"That in said conversation plaintiff told defendant Buchhalter that he did not send the note to Mr. Silverstein as requested, because he preferred, and thought it would be safer, to have it handled by the bank; that defendant Buchhalter then stated to plaintiff that he was right and requested plaintiff to have the note sent to the First National Bank of Denver, which plaintiff said he would do. [fol. 183] "That nothing further was discussed in said telephone conversation and that pursuant to said telephone conversation plaintiff sent a telegram to the Denver National Bank of Denver, which said telegram is designated herein as Exhibit 1-7.

(Signed) Ernest Morris, Attorney for Plaintiff.

Dated November 5, 1930."

To which offer of proof, objection was made and sustained, and exception allowed.

Q. Mr. Buchhalter testified that you told him that you wanted to go down and divide the proceeds of the money in the bank. Did you make any such statement to him in substance or in form?

A. I did not.

Q. Mr. Buchhalter further testified that you and him were to meet the next day after you had been at the bank to go down and get the bonds. Did you make any such

statement in substance or form to him, or was any such arrangement made by you with him?

A. No such a conversation.

Q. With reference to the check that you drew to Mr. Buchhalter at Mr. Silverstein's office, he testified that you stated that you had something in your mind by reason of the fact that you made the check payable to him, and that you stated that "You might sometime say it was a loan." Did you make any such statement in substance or form to him, Mr. Rude?

A. No, sir.

Witness denies Mr. Buchhalter's testimony to the effect that he, the witness, insisted that Buchhalter buy his, the witness', bonds; denies Mr. Buchhalter's testimony to the effect that in a conversation between the parties at the First National Bank on November 18, 1929, Buchhalter stated to the witness that he, Buchhalter, had a couple of hundred shares of Cities Service stock and a $1000 Straus bond.

Q. Mr. Buchhalter further testified as follows: "Mr. Rude stated that he would like to borrow between fifteen and twenty-five thousand dollars on his bonds at that time. I suggested that he try the bank, and he stated that he didn't want to try the First National Bank because they *they* turned him down with a loan of $4000.00 a year and [fol. 184] half or two years ago, and I told him that I think I know a party that would loan him fifteen or twenty thousand dollars on his bonds." Did you ever have any such conversation with him?

A. I did not.

Q. Mr. Buchhalter testified that, "Mr. Rude insisted on having a letter to show that it was a sale, to make believe that $7,500.00 was really paid in, it was a real sale." Please state, Mr. Rude, what you told him with reference to giving you a letter.

Mr. Lutz: Now, that would be direct again, to say whether or not this is true.

Mr. Morris: May it please your Honor, that is only Buchhalter's version of the transaction. It takes more than a denial to show what the real situation was.

The Court: He gave his version of the case. I have ruled on this, Mr. Morris, several times, and you may have your exceptions.

A. He did not.

At this juncture, Mr. Morris rests the case in behalf of the plaintiff.

No cross-examination of Mr. Rude by Mr. Lutz.

Mr. Lutz: May it please your Honor, I have some character witnesses for Mr. Buchhalter, Mr. J. C. Houston of the First National Bank and Mr. L. B. Bromfield. I don't know how much importance your Honor attaches to that sort of testimony. If you do, I will be glad to call those witnesses.

The Court: I don't think it makes much difference.

Thereupon the defendants offered and gave in evidence in surrebuttal as follows:

Arnold Olsen, a witness called on behalf of defendants in surrebuttal, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he is connected with the credit department of the Kohler-McLister Paint Company, having been so connected for five years last past; that he has lived in Denver thirteen years, and that he has met Mr. E. J. [fol. 185] Tracy of the Denver National Bank, and that he recalls a conversation with Mr. Tracy on a credit matter, but that the conversation related to some company with which Mr. Buchhalter was connected, and not a personal credit matter of Mr. Buchhalter's.

L. B. Bromfield, a witness called on behalf of defendants in surrebuttal, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he has lived in Denver twenty-three years and is Receiver for the Globe National Bank, and

has been such for some years last past; that he knows the defendant, Joseph Buchhalter, having been acquainted with him for six or seven years, and has had business relations and dealings with him, as Receiver of the Globe National Bank; that he knows the reputation of Mr. Buchhalter in Denver for truth and veracity, and that "it has been nothing but good as far as I am concerned."

Cross-examination.

By Mr. Morris:

Q. Mr. Bromfield, you say that it is nothing but good as far as you are concerned. Is it not a fact that you are basing that on personal transactions you had with him?
A. My personal experience with him in business and otherwise.
Q. That is the reason of the basis of your answer?
A. Certainly.

Witness states that he knows nothing about other persons' experiences that they may have had with Buchhalter; that his, the witness', dealings with Mr. Buchhalter were very satisfactory and that such is the basis of his testimony.

Joseph C. Houston, a witness called on behalf of the defendants in surrebuttal, testified as follows:

Direct examination.

By Mr. Lutz:

Witness states that he is Vice President of the First National Bank of Denver, having been such for twelve or fifteen years last past; that he is acquainted with Joseph Buchhalter, having known him about six or seven years, and has had various business relations with him, and that [fol. 186] his reputation is good.

Cross-examination.

By Mr. Morris:

Witness states that Mr. Buchhalter now has and has had for some time an account at the First National Bank, and

has brought business to the bank and is a customer there, but he does not base his statement of Mr. Buchhalter's reputation altogether upon his dealings; says that he has never heard anything derogatory to Mr. Buchhalter at the bank.

Q. Well, haven't you heard the manner in which he treated Mr. Charles B. Myers who was associated with him in the paper mill?

Mr. Lutz: These questions are highly objectionable.

The Court: The question is wholly unfair. Your question implies that his treatment was not proper.

Witness states that he does not think he has ever heard derogatory statements concerning Mr. Buchhalter.

Q. Never heard anybody speak ill of him at all?

Mr. Lutz: Objected to as immaterial. Suppose he did, your Honor. I dare say that there are few against whom somebody has not at some time spoken ill. This is a wholly improper line of examination.

A. Yes, I guess I have.

Witness states that he doesn't know how many people he has heard speak ill of Mr. Buchhalter; that he has never asked anybody, and doesn't believe that he had ever heard any one outside of the bank speak of him at all. Witness' testimony is based upon what he has heard at the bank and not conversation with other people, and that he has no personal knowledge of Mr. Buchhalter's reputation outside of the First National Bank.

RENEWAL OF MOTION TO DISMISS

Mr. Lutz: * * * That is all. Defendants rest, and I would like to renew the motion that we made on at least two or three occasions for dismissal on the merits.

Whereupon, the court directs counsel to argue the case upon the merits.

[fol. 187] COLLOQUY BETWEEN COURT AND COUNSEL

Whereupon, ensued extended colloquy and argument between court and counsel, among which was the following:

Mr. Morris: May it please your Honor, a note and deed of trust had been released and cancelled; that being so, this

is not a suit on a promissory note, as was stated and emphasized here, or upon a deed of trust. * * *

The Court to Mr. Lutz: You do not claim that this note was ever valid?

Mr. Lutz: We claim it was never valid.

The Court: That is what I say. Therefore, there cannot be any action on the note.

Mr. Lutz: Mr. Rude claims it is valid. He claims to hold bonds as security for his note.

The Court to Mr. Morris: You don't claim any title to the bonds, do you?

Mr. Morris: We claim that the bonds are held as security for the amount Mr. Buchhalter promised to pay.

The Court: Where is the title? There must be a title somewhere, not floating around in the air. In other words, if you claim a lien against a piece of property, that is an admission that someone else holds the legal title.

Mr. Morris: I think that, subject to the lien, Mr. Buchhalter had the legal title to the bonds.

The Court: Then, if you admit Mr. Buchhalter owned the title to them, then he could create other liens against them as long as those liens didn't interfere with your lien.

Mr. Morris: As long as they didn't interfere with whatever interest Mr. Rude had in the bonds.

The Court: And as the owner, or the bank having those bonds and you admitting they belong to Mr. Buchhalter, that he had legal title and you not having given the bank, or they had no notice of your lien, is your lien superior to the lien of the First National Bank?

The Court: You don't claim that they are on notice of your lien, because Mr. Rogers, as I understand it, left the room when they made this oral agreement, so they had no notice.

[fol. 188] Mr. Morris: I think that is true, but they had notice that Mr. Rude had an interest in the bonds, and they took the bonds subject to Mr. Rude's interest.

The Court: That is a different matter. A disbursement is an immaterial matter. That can be carried out after we find out what the rights of the parties are, but it seems to me if Mr. Buchhalter had title to the bonds, and they held them, then he had a right to pledge them to the bank and they had possession of them. Really the security to their

lien is superior to yours because they had possession of the security and a lien on it. All you have is a lien, not possession.

Mr. Morris: The bank held possession, but Mr. Rude had a beneficial interest in the bonds which the bank was cognizant of.

The Court: They didn't know of any beneficial interest. I don't think you could put it quite that strong where, as you say, the agreement was simply that they were not to pay them out until you consented to it. Your agreement at that time I do not think establishes a lien. A stakeholder is in a little different position from a person who holds property subject to liens of which they had notice. You don't claim the bank had any notice of your lien, or the nature of it?

Mr. Morris: The bank had notice that Mr. Rude had an interest in the bonds. What that interest was had not been established, and therefore the agreement with the bank was that they would hold until they agreed. Both parties cannot agree; therefore the court has to determine what those interests are.

The Court: Well, when the court decides that, then your lien of Mr. Rude—isn't that inferior and junior to the bank's lien?

Mr. Morris: I don't think so as far as Mr. Buchhalter's interest in the bonds is concerned. I think the bank's lien attached to whatever equity Mr. Buchhalter has in the bonds. It is perfectly good as to the Buchhalter interest in the bonds. It is not good as to Mr. Rude's interest.

The Court: You claim Mr. Buchhalter had legal title to them.

[fol. 189] Mr. Morris: I think they were not to be turned over to Mr. Buchhalter without Mr. Rude's consent.

The Court: That legal title was in him. He was never divested of the legal title. Therefore he had a right to deal with that legal title. The only notice the bank had was that they must not turn the possession of these over to Mr. Buchhalter, or let him take them away from the bank until Mr. Rude consented. That doesn't put them on notice that Mr. Rude had a lien, or in my opinion would not prevent the bank from lending money and taking them as a pledge.

Mr. Morris: The bank could take as a pledge whatever interest he had in the bonds. I will concede that.

Whereupon both parties were directed by the court to file briefs within ten days upon the facts.

The above and foregoing was all the evidence offered, given or received, other than the Exhibits, which are set out verbatim in the appendix.

Appendix to Condensed Statement of Evidence, Consisting of all Exhibits Received in Evidence and all Exhibits Offered but Excluded from Evidence and to Which Exclusion Proper Exceptions Were Reserved

The Exhibits received in evidence and hereto attached are plaintiff's Exhibits A to K, inclusive, and Exhibit M; and defendants' Exhibits numbers 1, 2 and 3, 5, 7, 8, 9, 11, 13, 14, 15 and 16.

The Exhibits excluded from evidence and to which exclusion proper exceptions were saved are plaintiff's Exhibits L and O.

Plaintiff's Exhibit A

This Memorandum of Agreement made this 14th day of May, A. D. 1929, between Max Bronstein, of the City and County of Denver, State of Colorado, of the first part, and I. Rude, of Dallas, State of Texas, of the second part, Witnesseth:

Whereas the parties hereto are interested as holders of [fol. 190] the bonds of Colorado Pulp and Paper Company, a Colorado corporation, which corporation is now in the hands of a Receiver, heretofore appointed by the District Court of Adams County, Colorado, in case No. 2367 in said court, the said parties hereto being interested as such bondholders in bonds either owned or controlled by them respectively in the following amounts, to-wit: The said first party to the extent of One Hundred Nine Thousand ($109,000.00) Dollars in par or face value of said bonds and the said second party in the sum of either Ninety-four Thousand ($94,000.00) Dollars or Ninety-six Thousand ($96,000.00) Dollars in par or face value of said bonds, the

Two Thousand ($2,000.00) Dollars difference or discrepancy being accounted for, as follows, namely: The Two Thousand ($2,000.00) Dollars of bonds so involved are held as collateral security to a claim filed against Colorado Pulp and Paper Company with the Receiver, and allowed by the Court on, to-wit, January 16, 1928, as of said date in the sum of Eleven Hundred Ninety-seven and 80/100 ($1197.80) Dollars, evidenced by a promissory note of Colorado Pulp and Paper Company, and said amount being for the balance of said note and for interest thereon due up to said January 16, 1928, and the bonds securing the same being bonds Numbers 23 and 25; and

Whereas a decree was entered and made of record in said cause, bearing date of January 16, 1928, decreeing the sale of certain property belonging to said corporation, as therein described, to be made by the Receiver, one George W. Beck, as Special Master so appointed for the purposes of said sale, and which said order of sale has been at various times modified by various orders of the court, and which said sale has been postponed from time to time and is now ordered to take place on the 6th day of June, A. D. 1929, at ten o'clock, A. M., upon the premises known as Colorado Pulp and Paper Company plant, in Adams County, Colorado; a copy of the notice of said sale being hereto attached and made a part hereof; and,

Whereas, the said parties hereto are desirous of protecting the interests represented by said bonds at the said sale and thereafter, and desire to act in harmony and in unison in connection therewith, and for that purpose desire to become the bidders at such sale in order to, if possible, to [fol. 191] acquire the properties to be sold thereat, for the protection of such interests.

Now, Therefore, It Is Agreed between the parties hereto, as follows:

1. The parties hereto shall unite their bonds, as above mentioned, for the purpose of participating in and utilizing said bonds for the purpose of making a bid at said sale; and for that purpose shall deposit, contemporaneously with the signing of this agreement, each of them Sixty Thousand ($60,000.00) Dollars in par value of said bonds with The United States National Bank of Denver, Denver, Colorado, in escrow, to be used in accordance with this con-

tract and for the purpose of being available for a bid at said sale in accordance with the terms thereof; the balance of the said bonds of each party, as above described, shall be likewise deposited in the same escrow agreement on or before twelve o'clock noon on June 1, 1929.

2. Outside of the bonds above described, there are outstanding in the hands of one party, to-wit, F. G. Bonfils, Twenty-five Thousand ($25,000.00) Dollars in par or face value of said bonds, which the parties hereto agree to acquire, in case they become the successful purchasers at said sale, either by paying the par or face value thereof, to-wit, the sum of Twenty-five thousand ($25,000.00) Dollars, for the bonds belonging to said Bonfils, together with all coupons thereto attached, each party to contribute an equal amount toward the purchase or acquisition thereof; or, if an arrangement can be made whereby such bonds may be utilized in conjunction with the bonds belonging to the parties hereto for the purpose of making the bid at said sale, with the understanding that they need not be paid for until after said sale shall have been confirmed and/or a deed to and possession of said property, delivered to the parties hereto after confirmation of said sale, then each party shall, at such time as such money is required to be so paid, contribute on the basis of fifty per cent each of whatever sum may be necessary to acquire the said Bonfils' bonds. The understanding is that the said Bonfils' bonds shall likewise be utilized in making the bid at said sale, herein provided for, if necessary.

3. It is the intention of the parties that the bid shall be made on the following basis, namely:

[fol. 192] To offer all of said bonds at their par or face value, to-wit, the sum of either Two Hundred Thirty Thousand ($230,000.00) Dollars, or Two Hundred Twenty-eight Thousand ($228,000.00) Dollars, as the case may be, or so much thereof as may be necessary, with the intention of holding interest coupons, which, at the date of sale, will be in default, to be filed as a claim against said Colorado Pulp and Paper Company, with the intention of having the same share with other claims already allowed against said corporation; or, if in the opinion of counsel for the parties

hereto, it shall so become necessary under the terms of the decree of sale, then bid enough of said bonds, which, with the accrued interest thereon, would amount to a bid equal to that hereinabove in this paragraph first mentioned; or, if in the opinion of the parties hereto, it becomes necessary at such sale so to do, then to bid at said sale all of said bonds so owned or controlled by the parties and so to be acquired, as hereinabove set forth, or so many thereof as they may deem advisable, together with the accrued interest thereon, as and for the bid of the said parties hereto at the said sale.

4. Under the terms of said decree of sale as at present modified, it is required that the bidder at said sale shall pay in cash the amount of the inventory of raw materials, and it is agreed that the parties hereto shall contribute such amount at said sale, in the event of confirmation, or any deposit thereon, if such is required, on the basis of fifty per cent each of said amount.

5. It is the intention of the parties hereto notwithstanding that first party owns or controls a larger amount of said bonds than does second party, that nevertheless all cash advanced, or necessary to be advanced, in order to acquire bonds and/or the purchase of claims of creditors, if such is deemed advisable, and to pay for all expenses necessary or incident to the protection of the interests represented by said bonds in connection with said contemplated bid and purchase, shall be met by the parties hereto in equal shares, and that any and all profits arising out of the sale of the property, in the event the parties hereto shall become the successful bidders at said sale, shall be divided between the parties hereto share and share alike.

6. It is further agreed that any bid made at such sale shall be in the joint names of the parties hereto and, in the [fol. 193] event of the parties hereto becoming the successful bidders at said sale, the evidences of title thereto shall be taken in the joint names of the parties hereto; and it is further agreed that, in the event the parties hereto shall not be able to make a sale of the said properties after they shall have become the owners thereof, in the event they should become the owners thereof, within sixty days from the date of the confirmation of such sale, a new corporation

shall be organized to which all of said property shall be transferred, which corporation shall place a new bond issue upon the properties to be transferred to it as a part of the consideration for such transfer, which said bond issue shall be in an amount equal to, and shall be distributed to each party, or as each party may respectively designate, to the extent of, the amount of bonds held or controlled and contributed by each party, respectively, to said bid and purchase, plus the amount in cash contributed by each party respectively for such bid, purchase, expense or operation as herein provided for, with interest thereon to date of such new bond issue; and the stock of said corporation, which shall be issued as a part of the consideration for the transfer of the properties to the corporation, shall be divided between the parties hereto share and share alike, and which said corporation shall have a Board of Directors, consisting of three members, the parties hereto to be two of said directors, and these two parties to designate the third director, and each of the parties hereto shall give such third director one share of stock in order to qualify him to act as such director.

7. It is further agreed that it is the intention of the parties hereto, in the event they become the successful purchasers at said sale, to, in the first instance, endeavor to make sale of said mill, at such price as will enable the interests represented by the bonds, above mentioned as belonging to the parties hereto or controlled by them, to be reimbursed for the amount of their investment in such bonds, being the par value thereof, and together with interest thereon, and together with the moneys contributed to carry out this agreement, and interest thereon, and to that end, it is agreed that in the event the parties hereto become successful in acquiring said properties at said sale, that neither of them will agree to a sale of said properties at an amount less than par and accrued interest on all of said bonds, to-wit, the sum of Two Hundred Thirty Thousand ($230,000.00) [fol. 194] Dollars or Two Hundred Twenty-eight Thousand ($228,000.00) Dollars as the case may be, plus accrued interest, and plus the cash advanced to make the bid at such sale, and plus whatever cash may have been advanced in connection with expenses and/or operating expenses of said mill or properties acquired at said sale; all with in-

terest thereon; but in the event a bona fide offer from some third person for cash is made to purchase said properties at any amount in excess thereof and either party hereto does not agree to such sale, or is not willing to accept such price, then such party so refusing to agree or to accept, agrees that he will immediately purchase the interest of the other party, at a price representing the equivalent of what such other party would have received had such last mentioned offer been accepted and a sale made at such price.

8. It is further agreed that in the event it shall become necessary to advance further moneys as or for additional capital for the operation of said mill, either before the new company is organized or after the same is so organized, that each party will contribute the same in equal amounts.

9. It is further agreed that in the event the bid of the parties hereto shall be the highest bid made at such sale, that they will cooperate in urging the confirmation of said sale and the approval and acceptance of said bid and the execution of proper conveyances with transfers to evidence the same, and, if necessary, will take said matter to the Supreme Court of the State of Colorado in order to procure approval of said bid and confirmation of said sale.

10. It is further agreed that the consideration for this agreement and for each promise and agreement on the part of each party to be performed, is the promise and agreement of the other party and the mutual interests of the parties hereto.

In Witness Whereof, The parties hereto have hereunto set their hands and seals at Denver, Colorado, the day and year first above written, to this agreement, in triplicate.

(Signed) Max Bronstine. (Seal.) (Signed) I. Rude. (Seal.)

[fol. 195] Escrow Agreement

To the United States National Bank of Denver, escrow holder:

There is herewith deposited with you by Max Bronst*ein*, Sixty Thousand ($60,000.00) Dollars par or face value of the

bonds of Colorado Pulp and Paper Company, and by I. Rude a like amount of Sixty Thousand ($60,000.00) Dollars par or face value of the bonds of Colorado Pulp and Paper Company.

These bonds are deposited in accordance with memorandum of agreement, bearing date May 14, 1929, between said Max Bronstein and said I. Rude, and are to be used under this escrow in accordance therewith.

An additional amount of bonds is to be deposited by each party on or before noon of June 1, 1929, as specified in said contract of May 14, 1929, likewise for the purposes of said contract, copy of which is hereto attached.

The escrow holder is to permit the deposit of such bonds at the time the bid is made as mentioned in said May 14th contract with the Receiver or Special Master at said sale and take his receipt therefor, and in the event the deed at said sale is confirmed is to furnish the rest of said bonds or so much thereof as may be necessary in order to carry out the terms of said bid.

In the event the parties to said agreement of May 14th are not the successful bidders at said sale, or in the event their bid should not be confirmed after efforts made on their behalf to have the same confirmed as provided for in said contract of May 14th, then the terms of the escrow are at an end and the bonds should be returned to the respective parties so depositing them; or this escrow may be likewise determined by the mutual consent of the said Max Bronstein and I. Rude, evidenced by written, signed statement to that effect delivered to the escrow holder.

Witness the signatures of the said Max Bronstein and I. Rude, this 14th day of May, A. D. 1929.

(Signed) Max Bronstine, (Signed) I. Rude.

[fol. 196] The undersigned agrees to the terms of the above escrow, and to act as escrow holder of said bonds in accordance therewith.

Dated May 17, A. D. 1929.

The United States National Bank of Denver, by
(Signed) A. H. Jewell, Trust Officer.

PLAINTIFF'S EXHIBIT B

Denver, Colorado, August 16th, 1929.

Mr. Joseph Buchhalter, Colorado:

In re Colorado Pulp and Paper Company Bonds and purchase of assets of said company at Special Master's sale.

DEAR SIR: In order that you may have written memorandum on the matter of our respective holdings in the purchase of the assets of Colorado Pulp and Paper Company at the sale thereof held by the Special Master appointed by the court in Case No. 2367 in Adams County, Colorado, I state same to you as follows:

You and I were both interested as holders of bonds of Colorado Pulp and Paper Company. Just prior to the Special Master's sale, which was held on June 6, 1929, I entered into a contract, dated May 14, 1929, with Max Bronstine, whereby we were to become joint bidders at the sale, which we did and we became the purchasers and the sale has been confirmed. We are now in possession of the property and assets so purchased.

I have already invested in this transaction $61,000.00 in principal of bonds, exclusive of the unpaid interest coupons accrued. You had invested therein the following amounts in cash: $16,000.00, $204.00, $5,500.00, $1,218.32, or total cash of $22,922.32, making your total investment of principal $53,922.32.

The arrangement and understanding between us is that we are in this transaction on a fifty-fifty basis as between yourself and myself, and that as moneys are needed for the expenses or operation of the mill, the corporation, etc., or in [fol. 197] compliance with the said contract of May 14, 1929, you will advance same until your total advances reach the sum of $61,000.00, of which you have already advanced $53,922.32 as above indicated.

When you have invested up to the amount of $61,000.00, so as to equal mine, then, if, as and when any other moneys are needed, we are to each contribute equally on a fifty-fifty basis for such purpose.

If moneys are not required or advanced so that you are not compelled to advance additional moneys up to the said sum of $61,000.00, then, at your option, you may either

equalize your holdings with mine by paying me the difference between what moneys you may have advanced and the $61,000.00, or may retain a proportional interest, based on the amount of bonds and coupons and cash you may have at such time advanced, as compared with mine.

(Signed) I. Rude.

Approved. (Signed) Joseph Buchhalter.

PLAINTIFF'S EXHIBIT C

Recorded Aug. 30, 1929, at 11:27 o'clock A. M.
Reception No. 153,133. Fred O. Pearce, Recorder.

This Deed, Made this twenty-ninth day of August, in the year of our Lord one thousand nine hundred and twenty-nine, between I. Rude, of Dallas, Texas, of the first part, and Joseph Buchhalter, of the City and County of Denver, and State of Colorado, of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of Seventy-five Thousand ($75,000.00) Dollars, to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lots or parcels of land, namely:

An undivided one-fourth (¼) interest in and to the fol- [fol. 198] lowing described real estate, situate, lying and being in the County of Gilpin, State of Colorado, to-wit: the North One-half (N. ½) of Section Thirty-six (36), Township One (1), South of Range Seventy-four (74) West of the Sixth Principal Meridian; the Walter A. Placer Mining Claim, and the following lode mining claims: Argo, Snowball Nos. One (1) and Two (2), Mystery Scranton Nos. One (1), Two (2), Three (3) and Four (4), Caroline M, Little Tootsey, Flying Jib and Reward, said mining claims being situated in Sections Twenty-six (26) and Thirty-five (35), Township One (1), South of Range Seventy-four (74), West of the Sixth Principal Meridian, in Gilpin County, Colorado.

Also an undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Adams, State of Colorado, to-wit: The West One-half (W. ½) of the Southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of Section Twelve (12), in Township Three (3), South, Range Sixty-eight (68) West of the Sixth Principal Meridian, except a strip of land one hundred (100) feet in width, and six hundred sixty (660) fee more or less, in length across the entire north end of the said West One-half (W. ½) of the Southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of said Section Twelve (12), being the north one hundred (100) feet of said tract of land; also except all rights of way now occupied for railroads and railroad purposes; and also except rights of way and easements now occupied for ditches and ditch rights, if any there be,

together with an undivided one-fourth (¼) interest in and to all improvements, buildings, machinery, equipment, tools, supplies, office furniture and fixtures, situated thereon or on any of the above described real estate, hereby conveyed, together with an undivided one-fourth (¼) interest in and to the good will of Colorado Pulp and Paper Company, and an undivided one-fourth (¼) interest in and to the waste paper contracts of said Colorado Pulp and Paper Company, and of all of its right, title and interest therein, and of the Receiver of said Company therein, insofar as the rights of said Company, or the Receiver therein, may be or are assignable;

[fol. 199] intending to hereby convey and conveying hereby, an undivided one-fourth (¼) interest in and to all and singular the same property conveyed by that certain Special Master's Deed, dated August 14th, 1929, from George W. Beck, as Special Master, as grantor, to I. Rude and Max Bronstein, as grantees, and which said Special Master's Deed was recorded August 15th, 1929, in Book 180, at Page 251, of the records in the office of the County Clerk and Recorder of Adams County, Colorado;

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever,

of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances; To Have And To Hold the said premises above bargained and described, with the appurtenances, unto Joseph Buchhalter, the said party of the second part, his heirs and assigns forever.

And the said I. Rude, party of the first part, for himself, his heirs, executors and administrators, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, by, through, or under the said party of the first part, the said party of the first part to Warrant and Forever Defend.

In Witness Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) I. Rude. (Seal.)

Signed, sealed and delivered in the presence of
(Signed) Carl F. Eiberger.

STATE OF COLORADO,
City and County of Denver, ss:

I, Marie B. Reed, a notary public in and for said City and County, in the State aforesaid, do hereby certify that [fol. 200] I. Rude, who is personally known to me to be the person whose name is subscribed to the foregoing Deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 29th day of August, A. D. 1929. My commission expires August 30th, 1931.

(Signed) Marie B. Reed, Notary Public. (Seal.)

(Endorsed on back:) 153,133. Warranty Deed. I. Rude to Joseph Buchhalter.

STATE OF COLORADO,
County of Adams, ss:

I hereby certify that this instrument was filed for record in my office at 11:27 o'clock A. M. Aug. 30, 1929, and is duly recorded in book 180, page 528.

Fred O. Pearce, Recorder, by (Signed) Geo. L. Bradford, Deputy.

Fee, $1.75, Paid. 14930.

STATE OF COLORADO,
County of Gilpin, ss:

I hereby certify that this instrument was filed for record in my office at 4:10 o'clock P. M., Sept. 10, 1929, and is duly recorded in Book 202, page No. 130.

(Signed) Clifford I. Parsons, Recorder.

$1.75 Pd.

Mail, when recorded, to Blount, Silverstein & Rosner, Attys. at Law, 404 Equitable Bldg., Denver, Colo.

PLAINTIFF'S EXHIBIT D

$67,500.00. Denver, Colorado, August 29th, 1929.

Six (6) months after date, for value received, I, we (and each of us) promise to pay to I. Rude or order Sixty-seven Thousand Five Hundred Dollars with interest from date at the rate of eight per cent per annum payable annually. Principal and interest payable at maturity.

It is agreed that if this note is not paid at maturity the principal and accrued interest thereon shall draw interest at the rate of eight per cent per annum. And a failure to pay any of said interest when due shall cause the whole note to become due and collectible at once, or the interest [fol. 201] to be counted as principal, at the option of the holder of the note. The makers and endorsers hereof hereby severally waive presentment for payment, protest, notice of non-payment and of protest, and agree to any extensions of the payment and partial payments before, at or after maturity. If this note or interest thereon is not paid when due I agree to pay all reasonable costs of col-

lection, including attorney's fees, and also waive all exemptions in case of suit on this note.

(Signed) Joseph Buchhalter.

Due February 29, 1930.

No. —. Deed of Trust and Notes Exhibited and Cancelled.

(Stamped across face:) Deed of Trust and Notes Exhibited and Cancelled.

(Written across face:) Cancelled & Discharged. Cancelled, Paid & Discharged.

(Endorsed on end:) This Note is Secured by Deed of trust.

Recorded Aug. 30, 1929, at 11:29 o'clock A. M., Book 180, Page 532.

Reception No. 153,134. Fred O. Pearce, Recorder.

No. 840. Deed of Trust.—Public Trustee.—Receiver's Clause.—Attorney's Fees.

This Indenture, Made this twenty-ninth day of August, in the year of our Lord one thousand nine hundred and twenty-nine, between Joseph Buchhalter, whose address is 765 York Street, City and County of Denver and State of Colorado, party of the first part, and the Public Trustee of the County of Adams in the State of Colorado, party of the second part, Witnesseth:

That Whereas, The said Joseph Buchhalter has executed his promissory note bearing even date herewith, for the principal sum of Sixty-seven Thousand Five Hundred and no/100 ($67,500.00) Dollars, payable to the order of I. Rude Six (6) months after the date thereof, with interest thereon from the date thereof at the rate of eight (8) per cent per annum, payable at maturity.

[fol. 202] (Stamped:) Deed of Trust and Notes Exhibited and Cancelled.

And Whereas, the said party of the first part is desirous of securing the payment of the principal and interest of said promissory note in whose hands soever the said note or any of them may be.

Now, Therefore, The said party of the first part, in consideration of the premises, and for the purpose aforesaid, does hereby grant, bargain, sell and convey unto the said

party of the second part, in trust, forever, the following described lots or parcels of land, namely:

An undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Gilpin, State of Colorado, to-wit: The North One-half (N. ½) of Section Thirty-six (36), Township One (1), South of Range Seventy-four (74) West of the Sixth Principal Meridian; the Walter A. Placer Mining Claim, and the following lode mining claims: Argo, Snowball, Nos. One (1) and Two (2), Mystery, Scranton Nos. One (1), Two (2), Three (3), and Four (4), Caroline M. Little Tootsey, Flying Jib and Reward, said mining claims being situated in Sections Twenty-six (26) and Thirty-five (35), Township One (1), South of Range Seventy-four (74), West of the Sixth Principal Meridian, In Gilpin County, Colorado;

Also an undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Adams, State of Colorado, to-wit: The West One-half (W. ½) of the Southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of Section Twelve (12), in Township Three (3), South, Range Sixty-eight (68) West of the Sixth Principal Meridian except a strip of land one hundred (100) feet in width, and six hundred sixty (660) feet, more or less, in length across the entire north end of the said West One-half (W. ½) of the southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of said Section Twelve (12) being the north one hundred (100) feet of said tract of land; also except all rights of way now occupied for railroads and railroad purposes; and also except rights of way and easements now occupied for ditches and ditch rights, if any [fol. 203] there be, together with an undivided one-fourth (¼) interest in and to all improvements, buildings, machinery, equipment, tools, supplies, office furniture and fixtures, situated thereon or on any of the above described real estate, hereby conveyed, together with an undivided one-fourth (¼) interest in and to the good will of Colorado Pulp and Paper Company, and an undivided one-fourth (¼) interest in and to the waste paper contracts of said Colorado Pulp and Paper Company, and of all of its right, title and interest therein, and of the Receiver of said Com-

pany therein, insofar as the rights of said Company, or the Receiver therein, may be or are assignable;

intending to hereby convey, and conveying hereby, an undivided one-fourth (¼) interest in and to all and singular the same property conveyed by that certain Special Master's Deed, dated August 14th, 1929, from George W. Beck, as Special Master, as grantor, to I. Rude and Max Bronstein, as grantees, and which said Special Master's Deed was recorded August 15th, 1929, in Book 180, at page 251, of the records in the office of the County Clerk and Recorder of Adams County, Colorado,

To Have and to Hold the same, together with all and singular the privileges and appurtenances, thereunto belonging: In Trust Nevertheless, That in case of default in the payment of said note or any of them, or any part thereof, or in the payment of the interest thereon, according to the tenor and effect of said note or any of them, or in the payment of any prior incumbrance, principal or interest, if any, or in case default shall be made in or in case of violation or breach of any of the terms, conditions, covenants or agreements herein contained, then, upon notice and demand in writing filed with the said party of the second part by the beneficiary hereunder or the legal holder of the indebtedness secured hereby, that such beneficiary or legal holder has declared a violation of any of the covenants herein contained, and has elected to advertise said property for sale, and demands such sale, it shall and may be lawful for said party of the second part to sell and dispose of the same (enmasse or in separate parcels, as said Public Trustee may think best) and all the right, title and interest of said party of the first part, his heirs or assigns therein, at public auction at the front door of the [fol. 204] Court House, in Brighton, County of Adams and State of Colorado, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, four weeks' public notice having been previously given of the time and place of such sale, by advertisement, weekly, in some newspaper of general circulation at that time published in said County of Adams, a copy of which printed notice, as soon as printed, shall be mailed to said party of the first part

(and all subsequent incumbrancers) at the address given in the trust deed, and to make and give to the purchaser or purchasers of such property at such sale, a certificate or certificates in writing describing such property purchased, and the sum or sums paid therefor, and the time when the purchaser or purchasers (or other person entitled thereto) shall be entitled to a deed or deeds therefor, unless the same shall be redeemed as is provided by law; and said Public Trustee shall, upon demand by the person or persons holding the said certificate or certificates of purchase, when said demand is made, or upon demand by the person entitled to a deed to and for the property purchased, at the time such demand is made, the time for redemption having expired, make and execute to such person or persons a deed or deeds to the said property purchased, which said deed or deeds shall be in the ordinary form of conveyance, and shall be signed, acknowledged and delivered by the said Public Trustee, as grantor, and shall convey and quit-claim to such person or persons entitled to such deed, as grantee, the said property purchased as aforesaid, and all the right, title, interest, benefit and equity of redemption of the party of the first part, his heirs and assigns therein and shall recite the sum or sums for which the said property was sold and shall refer to the power of sale herein contained, and to the sale or sales made by virtue thereof; and in case of an assignment of such certificate or certificates of purchase, or in case of the redemption of such property, by a subsequent incumbrancer, such assignment or redemption shall also be referred to in such deed or deeds; but the notice of sale need not be set out in such deed or deeds, and the said Public Trustee shall, out of the proceeds or avails of such sale, after first paying and retaining all fees, charges and costs of making said sale, pay to the beneficiary hereunder or the legal holder of said note the principal and interest due on said note according to the tenor and effect [fol. 205] thereof, and all moneys advanced by such beneficiary or legal holder of said note for insurance, taxes and assessments, with interest thereon at eight per cent per annum, rendering the overplus, if any, unto the said party of the first part, his legal representatives or assigns; which sale or sales and said deed or deeds so made shall be a

perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming the said property, or any part thereof, by, from, through or under said party of the first part, or any of them. The holder or holders of said note or notes may purchase said property or any part thereof; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money. If a release deed be required, it is agreed that the party of the first part, his heirs or assigns will pay the expense thereof.

And the said party of the first part, for himself and for his heirs, executors and administrators, covenants and agrees to and with the said party of the second part, that at the time of the ensealing of and delivery of these presents he is well seized of the said lands and tenements in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid; hereby fully and absolutely waiving and releasing all rights and claims he may have in or to said lands, tenements, and property as a Homestead Exemption, or other exemption, under and by virtue of any act of the General Assembly of the State of Colorado now existing or which may hereafter be passed in relation thereto; and that the same are free and clear of all liens and incumbrances whatever, excepting, however, and subject to, any and all writs of error sued out, or which may be sued out, in the Suprme Court of the State of Colorado, to review any judgment or decree of sale entered in Case No. 2367 in the District Court of Adams County, Colorado, wherein Charles B. Myers is plaintiff, and Colorado Pulp and Paper Company and others, are defendants, and the above bargained property in the quiet and peaceable possession of the said party of the second part, his successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will Warrant and Forever Defend.

[fol. 206] And that the said party of the first part will in due season pay all taxes and assessments levied on said property; all amounts due on account of principal and interest on prior incumbrances, if any; and, will keep all

buildings that may at any time be on said lands, during the continuance of said indebtedness, insured against loss by fire in such company or companies as the holder of said note may, from time to time direct, for such sum or sums as such company or companies will insure for, not to exceed the amount of said indebtedness, except at the option of said party of the first part, with loss, if any, payable to the beneficiary hereunder, as his interest may appear, and will deliver the policy or policies of insurance to the beneficiary hereunder, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of said party of the first part to thus insure and deliver the policies of insurance, or to pay such taxes or assessments or amounts due or to become due on any prior incumbrance, if any, then the holder of said note or any of them, may procure such insurance, or pay such taxes or assessments or amounts due upon prior incumbrances, if any, and all moneys thus paid, with interest thereon at eight per cent per annum, shall become so much additional indebtedness, secured by this deed of trust, and shall be paid out of the proceeds of the sale of the property aforesaid, if not otherwise paid by said party of the first part.

And That in Case of Any Default, Whereby the right of foreclosure occurs hereunder, the said party of the second part or the holder of said note or certificate of purchase, shall at once become entitled to the possession, use and enjoyment of the property aforesaid, and to the rents, issues and profits thereof, from the accruing of such right and during the pendency of foreclosure proceedings and the period of redemption, if any there be; and such possession shall at once be delivered to the said party of the second part or the holder of said note or certificate of purchase on request, and on refusal, the delivery of such possession may be enforced by the said party of the second part or the holder of said note or certificate of purchase by any appropriate civil suit or proceeding, and the said party of the second part, or the holder of said note or certificate of purchase, or any thereof, shall be entitled to a Receiver for said property, and of the rents, issues and profits thereof, after any such default, including the time covered by foreclosure proceedings and the period [fol. 207] of redemption, if any there be, and shall be en-

titled thereto as a matter of right without regard to the solvency or insolvency of the party of the first part or of the then owner of said property and without regard to the value thereof, and such Receiver may be appointed by any court of competent jurisdiction upon ex parte application, and without notice—notice being hereby expressly waived—and all rents, issues and profits, income and revenue therefrom shall be applied by such Receiver to the payment of the indebtedness hereby secured, according to law and the orders and directions of the court.

And, That in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note aforesaid, or any of them, or any part thereof, or of a breach or violation of any of the covenants or agreements herein, by the party of the first part, his executors, administrators or assigns, then and in that case the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said property be sold in the manner and with the same effect as if the said indebtedness had matured, and that if foreclosure be made by the Public Trustee, and attorney's fee of the sum of — dollars for services in the supervision of said foreclosure proceedings shall be allowed by the Public Trustee as a part of the cost of foreclosure, and if foreclosure be made through the courts a reasonable attorney's fee shall be taxed by the court as a part of the costs of such foreclosure proceedings.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) Joseph Buchhalter. (Seal.)

Witness: —— ——.

(Stamped:) Deed of trust and Notes exhibited and cancelled.

STATE OF COLORADO,
City & County of Denver, ss:

I, Marie B. Reed, a Notary Public in and for said City & County of Denver, in the State aforesaid, do hereby

certify that Joseph Buchhalter, who is personally known to me to be the person whose name is subscribed to the [fol. 208] foregoing Deed of Trust, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein specified.

Given under my hand and notarial seal this 29th day of August, A. D. 1929. My notarial commission expires August 30th, 1931.

(Signed) Marie B. Reed, Notary Public. (Seal.)

(Stamped:) Deed of trust and notes exhibited and cancelled.

(Endorsed on back:) No. 153,134. Deed of Trust from Joseph Buchhalter to The Public Trustee for the Use of I. Rude.

STATE OF COLORADO,
County of Adams, ss:

I hereby certify that this instrument was filed for record in my office at 11:29 o'clock A. M., Aug. 30, 1929, and is duly recorded in book 180, page 532.

Fred O. Pearce, Recorder, by (Signed) Geo. L. Bradford, Deputy.

Fees, $3.75, Paid.

Mail when recorded to Blount, Silverstein & Rosner, 404 Equitable Bldg., Denver, Colo.

14931

STATE OF COLORADO,
County of Gilpin, ss:

I hereby certify that this instrument was filed for record in my office at 4:15 o'clock P. M., Sept. 10, 1929, and is duly recorded in Book 202, page No. 131.

(Signed) Clifford I. Parsons, Recorder.

$3.75 Pd.

PLAINTIFF'S EXHIBIT E

Blount, Silverstein & Rosner, Attorneys and Counsellors, Equitable Building, Denver, Colo.

Successors to Dana, Blount & Silverstein

G. Dexter Blount, Harry S. Silverstein, David Rosner

August 29, 1929.

Mr. I. Rude, Denver, Colorado.

DEAR SIR: In view of the fact that you have this day conveyed to me a one-quarter interest in the mill and plant and [fol. 209] property formerly belonging to Colorado Pulp and Paper Company, and which you have been holding in trust for me, and have also conveyed another one-quarter interest, which was your own, and which I have this day purchased from you for $75,000.00 ($7,500.00 in cash and the balance of $67,500.00 secured by deed of trust on said one-quarter interest), and inasmuch as these transfers were made with the understanding as between us that the contract of May 14th, 1929, between yourself and Max Bronstine has not yet been abrogated or carried out according to its terms, this is to confirm the understanding between us that these conveyances are all subject to that contract between yourself and Max Bronstine, dated May 14th, 1929.

And further, that in the event of any controversy arising, or litigation between you and Max Bronstine, on account of the execution of these deeds, I will save you harmless from any and all damages, including attorney's fees, arising out of any litigation.

Yours very truly, (Signed) Joseph Buchhalter.

PLAINTIFF'S EXHIBIT F

(Postal Telegraph Blank)

Denver, Colorado, October 12, 1929.

I. Rude, c/o Joe Lifter, 110 West 34th Street, New York City, N. Y.:

Buchhalter Binstock Contract Signed All Papers Delivered to Buchhalter and Placed in Escrow Must Have

Note Here To Accompany Your Request Release Trust Deed Not Later Than Wednesday Next Week To Complete Deposit In Escrow Wire Answer.

Harry S. Silvertein.

Charge Blount, Silverstein & Rosner.

PLAINTIFF'S EXHIBIT G

This agreement, made and entered into this 10th day of October, A. D. 1929, by and between Joseph Buchhalter, of the City and County of Denver, Colorado, of the first [fol. 210] part, and M. Binstock, of said City and County of Denver, of the second part, Witnesseth:

That for and in consideration of the mutual agreements hereinafter contained, and in the further consideration of the sum of one dollar by each of the parties hereto to the other paid, the receipt whereof is hereby confessed and acknowledged, the said party of the first part does hereby covenant, promise and agree to and with said second party to sell, assign, transfer and convey to said second party, the following described property at the price and upon the conditions hereinafter set forth, and to accept said price in full payment therefor.

And upon like consideration said second party does hereby covenant, promise and agree to and with said first party to purchase and receive said property of and from said first party and to pay him therefor the purchase price thereof and upon the terms and conditions hereinafter set forth.

1. The property so to be purchased and sold consists of an equal undivided one-half interest of, in and to the real estate, machinery, fixtures and other property described in and conveyed by that certain deed from George W. Beck, as Special Master, to I. Rude and Max Bronstine, dated the 14th day of August, A. D. 1929, and recorded in the office of the recorder of deeds of the County of Adams, Colorado, on the 15th day of August, A. D. 1929, in book number 180 of the records to said office, at page 251, and in the office of the recorder of deeds of the County of Gilpin, Colorado, on the 2d day of September, A. D. 1929, in book number

202 of the records of said office, at pages 117 to 127, and which undivided one-half consists of the interest therein acquired by said Rude in and by said deed, which said first party represents he has purchased and acquired by deed from said Rude, and also all improvements and additions to said real estate or any part thereof, including all machinery, tools and equipment.

Also an equal undivided one-half interest of, in and to all goods, chattels and personal property of every kind and nature now or hereafter on or prior to November 1st, A. D. 1929, owned by and/or used in the business known by and conducted under the name of the Colorado Paper Mill Products Manufacturing Company, including therein all [fol. 211] cash in hand and contracts held by said company and those formerly obtained by purchase from said George W. Beck and being the interest therein acquired by said Rude by deed from said Beck above described and by bill of sale from said Beck to said Rude and Bronstine dated the first day of August, A. D. 1929, all of which said party of the first part represents that he has purchased and acquired of and from said Rude, together with all additions, accumulations and improvements thereon and thereof.

It is understood that by the description hereinabove contained it is intended on the completion of this contract that there shall be conveyed to said second party all interest in said property and busiress acquired or owned by said Rude or said party of the first part up to and including the carrying out of this contract, so that upon the fulfillment of this contract neither the said Rude nor the said party of the first part shall have any interest in or to or claim upon or against said property and/or business, or any part thereof.

The interest acquired by said Rude being something less than one-half of said property, it is understood and agreed by and between the parties hereto that the property above described shall consist only of the interest of said Rude so acquired by deed and bill of sale or otherwise, together with any interest therein acquired by said first party or said Rude from any other source.

The said property shall be sold and conveyed free and clear of all liens and encumbrances of whatsoever kind or nature, by good and sufficient warranty deed and warranty bill of sale, and by such other conveyance or assurance of title, including any necessary or proper further convey-

ances or releases from said Rude, and/or said first party, as said party of the second part or his attorneys may reasonably require. In case any further conveyances or releases required by said attorneys cannot be obtained by said first party, then this contract shall become null and void, unless said second party is willing to accept the conveyances and releases so produced.

2. The purchase price of all of said property is the sum of One Hundred Eleven Thousand, Five Hundred Dollars ($111,500.00), and in addition thereto one-half of the value [fol. 212] of chattel property and bills and accounts receivable of said company, including therein any prepaid and unearned insurance premiums but not including any machinery, tools or equipment, less one-half of the liabilities of said company, including a reasonable reserve for taxes thereon for the year 1929, and the amount of any prior unpaid taxes thereon, which taxes, both of 1929 and prior thereto, shall not be paid by said George W. Beck as Special Master or as receiver of Colorado Pulp and Paper Company under the order of the District Court of Adams County, Colorado. Said liabilities shall not include any deduction for depreciation of machinery, nor shall the same be deducted from such assets.

Prior to November first, 1929, an inventory of all of the chattel property and assets so to be sold and conveyed, excepting said real estate, shall be taken herein by the parties hereto or by their representatives jointly, and all stock on hand and other materials and supplies shall be taken at actual cost to said business, including in said cost the cost of the labor used in manufacturing any articles which have been manufactured or are in process of manufacture, and which inventory and list of accounts and liabilities shall be kept up by all necessary and proper additions to and/or subtractions therefrom to the time of the performance of this contract, it being the intention hereby that the purchase and sale herein provided for shall be completed as of November 1, A. D. 1929.

In case any dispute arises between the parties hereto as to the amount or value of said assets and/or liabilities, or any part thereof, the same shall be submitted to arbitration, each party selecting one arbitrator and the two so selected shall choose the third, and the decision of the arbitrators or of a majority thereof as to the matters submitted to them

shall be final and conclusive and binding upon both parties hereto.

3. The purchase price of said property shall be paid and received in the following manner, viz:

Nineteen Thousand Dollars ($19,000.00) thereof, together with the value of the one-half interest in the chattel property and bills and accounts receivable as fixed and determined as above provided, shall be paid in cash on the execu- [fol. 213] tion and delivery by said first party to said second party of all property deeds and conveyances and assurances of title, and the remainder of said purchase price shall be paid in bonds of a corporation to be organized, which bonds are to be issued as hereinafter provided.

As soon as reasonably possible after the execution of this contract the said party of the second part agrees that he will form or cause to be formed a corporation under the laws of the State of Colorado, to which shall be conveyed all of the property above described, and in addition thereto the other undivided one-half interest in said property now owned by said Max Bronstine, and which corporation shall issue or cause to be issued its valid bonds of said company to the amount of Two Hundred Thousand Dollars ($200,-000.00) provided as hereinafter set forth, which bonds are to be secured as a first and prior lien on all of the real property so conveyed to said company, by a mortgage deed in the ordinary form of mortgages used for like purpose, wherein and whereby said real property shall be conveyed to some bank or trust company in said City and County of Denver to be selected by said second party, as security for the payment of said bonds and the interest thereon. Said bonds shall be in denominations of Five Hundred or One Thousand Dollars aggregating Two Hundred Thousand Dollars; shall be dated November 1, 1929, and shall bear interest at the rate of six per cent per annum from date, payable quarterly on the first days of February, May, August and November of each year, commencing April 1, 1930. The bonds shall have the following maturities, viz.:

$2,000.00 payable two years after date,
5,000.00 payable three years after date,
15,000.00 payable four years after date,
20,000.00 payable five years after date,
25,000.00 payable six years after date,

30,000.00 payable seven years after date,
33,000.00 payable eight years after date,
35,000 payable nine years after date, and
35,000.00 payable ten years after date.

The said bonds shall be redeemable at the option of said company, in whole or in part, on any interest due date at one hundred and three per cent of par, and all accrued and unpaid interest, and the form of the bonds shall so provide. [fol. 214] The said mortgage deed shall contain the usual covenants and conditions in like deeds and shall provide that upon default for a period of not less than fifteen days in the payment of the interest on said bonds or any principal thereof when due, the said trustee named therein shall be required at the request of bondholders owning not less than one-third of the bonds then outstanding to commence an action to foreclose said mortgage deed and continue the same until final judgment and sale.

The said balance of the purchase price above referred to shall be paid by the issuance and delivery to said first party of said bonds at par to the extent of the balance of said purchase price, said bonds to be so delivered to consist of one-half of the bonds according to their maturities commencing with those first maturing, until the balance of said purchase price is fully paid by the delivery of said bonds.

4. Upon the execution of this contract, or as soon thereafter as possible, there shall be deposited in the First National Bank of Denver, as escrow holder (together with appropriate escrow instructions to be signed by the parties hereto) the deed or deeds and bill or bills of sale provided for hereinabove conveying said property above described from said first party to said second party, together with any and all deeds, releases, assignments or other conveyances which may be necessary or proper and which are now held by said first party from said I. Rude or from any person or persons who may have or claim any interest in said property so to be purchased and sold which said first party may acquire, or have acquired, together with a certified or cashier's check, payable to the order of said first party in the sum of Nineteen Thousand Dollars ($19,000.00) and there shall also be deposited from time to time prior to the carrying out of this contract any deeds, conveyances, releases or other instruments which said party of the second

part or his attorneys may reasonably require and which may be necessary or proper, when and as requested by said second party or his attorneys, subject to the provisions hereinabove contained.

Whenever said bonds have been legally and properly so much thereof as may be required to pay the balance of said purchase price as above provided shall likewise be delivered to said escrow holder to be held and disposed of by it in accordance with the terms and conditions herein contained.

[fol. 215] When said bonds shall be examined and approved by the attorneys for said first party and said conveyances shall be examined and approved by the attorneys for said second party and a certificate or certificates shall be produced from the proper officers showing that no lien upon or conveyance of said property so agreed to be purchased and sold as aforesaid has been created or made subsequent to the issuance of said deed from said Special Master, or by said first party or said I. Rude at any time other than any conveyance of record from said Rude to said first party, and upon payment of the balance of that part of said purchase price, which shall be paid in cash as above provided by said second party by certified or cashier's check payable to said first party and delivered to said escrow holder, then said escrow holder shall deliver all such deeds, conveyances, contracts and assurances above provided to said second party and said checks and bonds to said first party.

5. It is the intention of the parties hereto that said bonds shall be dated as of the first day of November, A. D. 1929, and the terms of this contract shall be carried out and fully performed on said last named date, or as soon thereafter as said bonds are executed and ready for delivery. In case said bonds shall be so ready for delivery prior to said date, then this contract shall be carried out and performed whenever said bonds are so ready, notwithstanding the fact that the same shall be dated as of the date last above mentioned.

6. Said first party further agrees that he will take no action in the suit or suits now pending in the Supreme Court of this State concerning said property or which may hereafter become pending therein or in any Court with reference thereto, which may injuriously affect the in-

terests of said second party or said Max Bronstine, and any lis pendens filed as a result of said suit or suits shall not be considered as a lien or encumbrance on said property, but the said deed and bill of sale from said Special Master shall be considered as conveying a valid title free of liens and encumbrances as of the date of said deed.

7. This contract shall run to and be binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

[fol. 216] In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) Joseph Buchhalter, Party of the First Part. (Seal.) (Signed) M. Binstock, Party of the Second Part. (Seal.)

(Endorsed on cover:) Agreement Between Joseph Buchhalter and M. Binstock. Dated October 10, 1929.

PLAINTIFF'S EXHIBIT H

(Western Union Telegraph Blank)

1929 Oct 14 P M 1 29.

NA208 10 NM=New York N Y 14.

Jos. Beechhalter, Roosevelt Hotel, Denver, Colo.:

Advise Silverstein note mailed care Denver National Bank wrote you.

I. Rude.

PLAINTIFF'S EXHIBIT I-1

October twenty-first, 1929.

Mr. Joseph Buchhalter, 765 York Street, Denver, Colorado.

DEAR MR. BUCHHALTER: In accordance with our understanding we are informing you of the cost to us of a night message dated October 17 directed to Mr. I. Rude at New

York City with reference to the depositing of your note, payable to his order, with the First National Bank of this city.

We should appreciate receiving a check from you, at your convenience, in the sum of $3.07 representing the cost to us of the above mentioned telegram.

Yours very truly, H. E. Parks, Trust Officer.

HEP:AM.

[fol. 217] PLAINTIFF'S EXHIBIT I-2

October twenty-first, 1929.

Mr. I. Rude, Dallas, Texas.

DEAR MR. RUDE: In response to the instructions contained in your telegram of October 18th, we have deposited with the First National Bank of this city the note signed by Joseph Buchhalter payable to your order in the sum of $67,500, which you sent to us in your letter of October 14th. We received from the First National Bank a receipt for the note, a copy of which we are enclosing.

We sincerely hope that our action in this matter will meet with your approval, particularly since the receipt is practically a verbatim copy of your telegram of October 18th.

Assuring you of our pleasure in being of service to you, we are

Yours very truly, H. E. Parks, Trust Officer.

ENC.
HEP:AM.

PLAINTIFF'S EXHIBIT I-3

Postal Telegraph—Commercial Cables

Telegram

October 21, 1929.

Mr. I. Rude, Dallas, Texas:

Buchhalter note deposited with First National per your telegram eighteenth.

The Denver National Bank.

Collect.

PLAINTIFF'S EXHIBIT I-4

The First National Bank of Denver, Colorado

October twenty-first, 1929.

Denver National Bank, Denver, Colorado.

GENTLEMEN: We hereby acknowledge receipt of that certain note, dated August 29, 1929, signed by Joseph Buchhalter , as maker, payable to I. Rude, Six (6) months after [fol. 218] the date thereof, for the sum of $67,500.00, with interest at the rate of eight (8) percent per annum.

This note, as per the instructions of telegram of I. Rude of October 18, 1929, to The Denver National Bank, is to be placed and held in escrow with the undersigned for the purpose of, and in pursuance of, that certain contract and escrow instructions between Morris Binstock and Joseph Buchhalter, dated October 10, 1929, covering the sale by Buchhalter to Binstock of his interest in the Plant and assets of Colorado Pulp and Paper Company, and said note is received with the understanding that it is to be turned over in pursuance of said contract, and to comply therewith, and upon the agreement on the part of the undersigned, that we will hold any and all proceeds deposited with us under said contract or said escrow instructions until Joseph Buchalter and I. Rude have agreed in writing concerning disposition of said proceeds.

Yours very truly, (Signed) W. F. Rogers, Vice-President.

O. K. (Signed) Joseph Buchhalter.

PLAINTIFF'S EXHIBIT I-5

October 16, 1929.

Mr. I. Rude, Dallas, Texas.

DEAR MR. RUDE: We are in receipt of your letter of October 14, enclosing unendorsed note, $67,500, dated August 29, 1929, payable six months, and signed by Joseph Buchhalter.

I have called Mr. Silverstein, reading your letter to him, and he tells me that he will get in touch with you by wire, as conditions, as I understand it, have been somewhat changed.

Your instructions to us are noted, but they too will have to be more definite, as your letter reads as follows: "I am to receive up to the amount of the note, but not less than $40,000, the balance, if any, I am to take in note secured by Mr. Buchhalter for a period not exceeding one year."

You will readily see that we must have definite instructions relative to the security to be placed with us in case Mr. Buchhalter gives you a note for any unpaid portion.

[fol. 219] I have placed the latter and note in our Trust Department, and assure you that we are glad to serve you.

With kindest personal regards, I am,

Sincerely yours, —— ——, Vice-Chairman Board of Directors.

WBM—T.

PLAINTIFF'S EXHIBIT I-6

Postal Telegraph—Commercial Cables

CHB355 108 Blue 1/64. 1930 Oct. 18, P.M. 3:37.

PA Washington DC 18 355P.

The Denver National Bank, Denver, Colo.:

I hereby authorize you to deliver Buchhalter note dated August Twenty Ninth Nineteen Twenty Nine for Sixty Seven Thousand Five Hundred Dollars to The First National Bank of Denver Colorado as escrow holder under terms any escrow instructions made executed and delivered persuant to any contract of sale between Joseph Buchhalter and M Binstock covering sale Buchhalter interest in property described in trust deed securing said note upon your taking receipt from escrow holder stating it will hold any and all proceeds deposited with it under said contract or said escrow instructions until Buchhalter and myself have agreed in writing concerning disposition of said proceeds. Answer Dallas Texas

I. Rude.

PLAINTIFF'S EXHIBIT I-7

Western Union

NA32 64 NL—New York NY 16. 1929, Oct. 17
A.m. 12: 58.

Mr. Morrison, care Denver National Bank, Denver, Colo.:

Supplementing my letter with the Buchhalter note now in your possession I herewith authorize your bank to deliver same to First National Bank escrow holder of paper mill sale agreement you getting receipt stating that the purchase price of about thirty eight thousand dollars cash and all bonds delivered by purchaser be held until Mr. Buchhalter and myself have agreed on release in writing.

I. Rude.

[fol. 220] PLAINTIFF'S EXHIBIT I-8

Confirmation of Night Message

Message sent via Western Union Telegraph Company from Lewis & Grant, Denver, Colorado:

October 17, 1929.

I. Rude, Plymouth Hotel, New York City:

Before delivering note enclosed your letter October fourteenth to escrow holder, we must have your instructions as follows Stop I hereby authorize you to deliver Buchhalter note dated August twentyninth nineteen twentynine for sixty-seven thousand five hundred dollars to The First National Bank of Denver Colorado as escrow holder under terms any escrow instructions made executed and delivered pursuant to any contract of sale between Joseph Buchhalter and M. Binstock covering sale Buchhalter interest in property described in trust deed securing said note upon your taking receipt from escrow holder stating it will hold any and all proceeds deposited with it under said contract or said escrow instructions until Buchhalter and myself have agreed in writing concerning disposition of said proceeds.

The Denver National Bank.

(Prepay and charge Denver Nat. Bank.)

PLAINTIFF'S EXHIBIT I-9

Mr. I. Rude, c/o M. Cimbalo, Attorney and Counsellor at Law, 1451 Broadway, New York City

October 14th, 1929.

Denver National Bank, Denver, Colorado.

Att. Mr. Morrison, Vice-Chairman of the Board of Directors

DEAR MR. MORRISON: I am herewith encloisng Joseph Buchhalter's note dated August 29, 1929, for the sum of $67,500.00 payable six months after date.

Kindly notify Mr. Harry S. Silverstein, Attorney at Law, Equitable Building, that you have this note in your possession.

I have received a telegram from Mr. Silverstein stating [fol. 221] that the mill has been sold, but on what terms and conditions I do not know. Whatever cash the purchasers is paying on the purchase price, I am to receive up to the amount of the note, but not less than $40,000.00. The balance, if any, I am to take a note secured by Mr. Buchhalter, for a period not exceeding one year.

If the note is to be deposited in escrow with the other papers, you may do so with the understanding that the above conditions are to be carried out before surrender of the note.

If there should be any changes in this instruction, I shall write you further.

I intend to leave here for Dallas in a few days. My present address is, Plymouth Hotel, New York City.

Sincerely yours, (Signed) I. Rude.

IR:LB.

PLAINTIFF'S EXHIBIT J.

(Western Union Telegraph Blank)

October 16, 1929.

Mr. I. Rude, 110 West 34th Street, New York City, New York:

Received letter Denver National stop Binstock depositing Nineteen Thousand Dollars now stop Balance up to

about Thirty Eight Thousand together with bonds after incorporation of Company and taking of inventory which will be November 1 stop all Silverstein can give bank now is receipt for note and statement that proceeds both cash and bonds will remain in present escrow subject to your order and will not be drawn down unless approved by you stop wire bank to turn over note upon receipt.

Joseph Buchhalter.

Copy. DH.

PLAINTIFF'S EXHIBIT K

(Postal Telegraph Blank)

1929, Nov. 16, A.M. 2:37.

DA2 39 NL Denver, Colo 15.

I. Rude, 1200 Elm St., Dallas, Tex., 634:

Mill deal closed today can you come to Denver so we can [fol. 222] wind up the whole thing some money still to be paid next week but we can settle things in meantime how is the stock market in Dallas.

Joseph Buchhalter.

PLAINTIFF'S EXHIBIT L

(Cut of the Building)

9209 A. R.

I. Rude, Wholesale and Retail Men's and Boys' Clothing, Furnishings, Hats and Shoes, Dallas, Texas, 1200 Elm Street

Phone: 7-3809

Nov. 4, 1929.

Mr. Joseph Buchhalter, Roosevelt Hotel, Denver, Colo.

DEAR JOE: Now that the stock is revived, I feel more at liberty to write to you. I am very short of money to pay

for merchandise just purchased in New York, and between Mrs. R., the B. B., and the stock purchased this year, has cleaned me to the bottom. If the Mill deal is closed, and the money paid over, please have the bank send me a draft on account, on the note; the balance we can adjust satisfactorily in writing when I return to Denver.

There might be a possibility that you can make a deal with the bank to pay me the balance. However, that is to be taken up later.

On receipt of this letter, please wire me when the money will be paid over.

With best wishes, your friend,

(Signed) I. Rude.

IR:DM.

Regards to the folks. Do you intend visiting me?

Will there be some profit to help pay attorneys in the final Mill settlement?

PLAINTIFF'S EXHIBIT M

1929, Nov. 7, A. M. 1:18

VA3 50 NL Denver, Colo. 6.

J. Reede, 1200 Elm Street, Dallas, Texas:

Bonds and nineteen thousand in escrow in bank. The bal-
[fol. 223] ance to be put in as soon as discrepancy in inventory of fifty five hundred is straightened out. Am having Lindsey to check over inventory at once. Bank will not release any money until final settlement and until consented by you.

Jas. Buchhalter.

EXHIBIT O

9209 A. R.

Blount, Silverstein & Rosner, Attorneys and Counsellors, Equitable Building, Denver, Colo.

Successors to Dana, Blount & Silverstein

G. Dexter Blount, Harry S. Silvertein, David Rosner

May 16, 1929.

Received of I. Rude 40 shares Manufactu-(?) Trust Comp. which I agree to return on Demand Certificate No. B61369.
(Signed) Jos. Buchhalter.

DEFENDANTS' EXHIBIT 1

Denver, Colorado, August 29th, 1929.

Mr. Max Bronstine, % M. Binstock & Co., 1633 Arapahoe, Denver, Colorado.

DEAR SIR: On August 6th last I received a letter addressed to me by your attorneys, Messrs. Van Cise & Robinson, which presumably was sent at your instance, in connection with the matter of the $2,000.00 of bonds of Colorado Pulp and Paper Company, which were to be utilized in the purchase of the assets of that company at the Master's sale, and which were not then available but which were subsequently produced.

In this letter you outlined and set forth your protests in connection with that transaction, and hence I am likewise so outlining certain protests which I have against certain conduct on your part in connection with the conduct of the operations of the mill which were purchased for the joint account of yourself and your associates and myself and my associates.

In the matter of Insurance. You have seen fit to place the insurance on the mill with a concern or concerns in which you have an interest, or through which you receive a profit, [fol. 224] thereby obtaining a profit out of transactions for the mill and on behalf of the mill through another channel.

You stated to me that your reason for doing this was because you also had to make a living outside of the mill. This was your statement to me after I complained to you about this transaction, which I did immediately upon hearing of it. At that time I suggested to you that certain insurance should be given to parties I named who I thought deserved and needed the business and were really entitled to the business, for reasons I then mentioned to you, and was disposed to overlook the other matter provided this was done. You did then give some of this insurance to some of these outside parties, but thereafter cancelled some of it and replaced it in the same firm from which you derived a personal profit. This entire transaction I regard as not in good faith and as in violation of the fiduciary relationship which exists between us.

In the Matter of the Purchase of Waste Paper

You are and were at all times fully advised as to the situation that existed at the mill with reference to the mill procuring its supplies of raw material, to-wit, waste paper. This situation was fully gone into in the presence of several people and you fully agreed with me that it would — for the best interests of the mill that it endeavor to secure immediately for itself all contracts for the gathering of waste paper which had been theretofore acquired by Colorado Pulp and Paper Company, and which had been purchased at the sale, and joined in a demand on Messrs. Grimes and Friedman, Semirg Corporation, et al., to immediately turn over the same to us. Since that time something has apparently occurred or intervened to give you a change of heart upon this question, and you have stated that you entered into a contract with them to furnish paper to the mill for a period of sixty days. This is absolutely contrary to my express wishes and desires and to our understanding, and I do not consent to it. Pursuant to our first talk about the matter, and to our express policy, to which you agreed, I had papers prepared in order to procure a citation as against Messrs. Grimes and Friedman, Semirg Corporation, et al., to appear in court in the pulp mill case in Adams County to show cause why they should not immediately turn over these waste paper contracts. Although you cooperated in making the demand upon them so to do, yet you have

[fol. 225] refused to cooperate in the petition, and hence delayed a matter which we have both agreed is of prime importance to the mill. This also I regard as a violation of our contract, and a breach of your fiduciary relationship.

In the Matter of the Employment of Help

In the employment of help at the mill, you insisted on the employment of McCaskill as manager. This was against my express wishes and the employment was at a price much higher than Mr. McCaskill had previously been getting in a similar capacity, and very much higher than that at which an adequate manager could have readily been obtained I protested against this but rather than come to an open breach I decided not to make an absolute issue of it, and hence I ceased my protests. In addition to this you have also employed Henry Bronstine, a relative of yours while at the same time you refused my request that a brother of mine, fully capable to be likewise employed, be employed, this brother being a man who has had ample experience—against this conduct I likewise protested, but likewise declined to make an issue of it in order to avoid an open breach.

In the matter of the Power Plant. I have repeatedly called to your attention the urgency and the absolute necessity of having the mill equipped with an adequate, economical and up to date power plant which would mean the saving of approximately $4,000.00 a month in the operation of the mill. This has been the advice of competent engineers and is almost a matter of record in this case. It would, of course, mean the expenditure of considerable moneys, but this is in accordance with the agreement of May 14th. You have refused to even discuss that matter, and not being able to get you to listen to a discussion of this or to procure your cooperation in this respect, I have even gone to close personal friends and business associates of yours to urge them to plead with you to give some thought to the matter, so as to endeavor to secure real cooperation and a real compliance with the spirit of the agreement of May 14th, and to save a great waste in the mill's operations—but up to the present time all to no avail. This also I regard as a violation of your contract and the understanding between us.

Following the lead, therefore, suggested by the communication of August 6th, 1929, above mentioned, this letter is [fol. 226] written to you so as to advise you that I am not in any way waiving any of my rights nor any rights for redress against you, should that become necessary.

Yours very truly, (Signed) I. Rude.

DEFENDANT'S EXHIBIT 2

Denver, Colorado, August 30th, 1929.

Mr. Max Bronstine, c/o M. Binstock & Company, 1633 Arapahoe Street, Denver, Colorado.

DEAR SIR: Since writing you on yesterday, I have learned that Mr. McCaskill has returned from Kansas City where he went under your instructions for the mill, and entered into contracts with Lechtmann Printing Company and others to supply paper board.

This is contrary to the business policy you and I have discussed and you know that I opposed the same because such contracts are taken at prices which will yield the mill no profit, but simply to make an outlet for paper and enable the mill to buy more waste paper. I think I understand the reason why this is done and why you pursue this policy. You understood fully, and I thought that you had agreed with me, that the best policy for the mill to pursue was to only supply the Denver or local market and only buy waste paper enough to supply that market, and that such waste paper could be secured at a reasonable price and one which would yield the mill a profit, even on such operations.

I am now convinced that your attitude from the beginning has been one which was designed to exclude me entirely from any voice in the operations of the mill, notwithstanding the contract of May 14th, 1929. You have consistently overruled my suggestions, even in such small matters as the place of deposit for the bank account; even though I was in town and available you have not advised me as to what was going on, nor advised with me as to policies to be pursued.

In view of the entire circumstances therefore I find that I am of no use to you. I am not being consulted in the con-

duct of the mill, and have no voice in the same, and I have [fol. 227] apparently become persona non grata to you and therefore I have determined to go back to my business in Dallas, and hence I have transfered to Mr. Buchhalter his one-fourth interest in the mill, and have also sold to him my one-fourth interest, and conveyed the same to him. This conveyance was made subject to our contract of May 14th, 1929.

I trust that this new arrangement will prove satisfactory and that you will be able to get along with Mr. Buchhalter, and that there will be more cooperation than I was apparently able to furnish.

I am also enclosing copy of letter I have this day written to Messrs. Grimes and Friedman and to The United States National Bank of Denver.

Yours very truly, (Signed) I. Ruede.

DEFENDANTS' EXHIBIT 3

Denver, Colorado, September 17th, 1929.

Registered mail return receipt requested.

Mr. Max Bronstine, c/o M. Binstock & Company, 1633 Arapahoe Street, Denver, Colorado.

DEAR SIR: In reply to your letter of September 11th, there is no good to be gained by either my asserting that the statements contained in my two previous letters are correct nor by your assertion that they are untrue.

It is, however, necessary to controvert that portion of your letter in which you state that anything I have done was contrary to our agreement and understanding, or that by anything I have done I have prevented myself from carrying out the agreement of May 14th.

You were particularly advised by my previous letter that any transfer to Mr. Buchhalter was made subject to the agreement of May 14th, 1929, and I am and have been at all times ready, able and willing to carry out that agreement and see that it is carried out so far as my part of it is concerned.

Your exclusion of me from any voice in the management, or in the employment of help, or in the disposition or plac-

[fol. 228] ing of insurance policies and in contracting for waste paper, can only be interpreted by me as an unwarranted assumption of authority on your part, to which I have at all times voiced my objections, and I still protest against such actions on your part. The contract did not provide for any such exclusive control, but in spite of all this, to which I still object and protest, I am, and at all times have been, ready, able and willing to comply with any and all portions of the agreement of May 14th, on my part to be performed; nor has there been any failure or refusal on my part to carry out the terms of that contract.

Yours very truly, (Signed) I. Rude.

DEFENDANTS' EXHIBIT 5

I. Rude, Wholesale and Retail Men's and Boys' Clothing, Furnishings, Hats, and Shoes, 1200 Elm Street, Dallas, Texas

Phone: 7-3809

Dec. 7, 1929.

Mrs. J. Buchhalter, 765 York St., Denver, Colo.

DEAR MRS. BUCHHALTER: You might be surprised to receive this letter from me, but I feel obligated to you, through your kindness shown me on so many occasions, to advise you before it is too late that your husband's attitude towards me will not bring good results.

I am primarily interested in you and your children, which are not at fault. When I have to go into court, which I am compelled to under the present conditions, I know many people are waiting anxiously to pull your family more in the mire with sensational news items.

While your husband might not care, and be indifferent, as he has been in the past, money isn't everything, and I am sure that you feel the same way. Therefore, if it is in your power to convince Mr. Joe Buchhalter that he is doing wrong, not only to his staunch friend, as I have been to him so many years, but to you and yours, to change his attitude for once in his life, if not before, before it is too late to make a satisfactory settlement with me.

Hoping you will not misunderstand the purpose of this letter, I am not seeking favors, only it is an obligation on

[fol. 229] my part to you to advise you of the unfortunate situation, which I hope can be avoided, maybe through your good judgment.

Again thanking you and your boys for past kindness shown to me and mine, I remain,

Sincerely yours, (Signed) I. Rude.

IR:DW.

DEFENDANTS' EXHIBIT 7

200 Rooms. (R.) 100 Baths

Hotel Roosevelt, Eighteenth Street at California, Denver, Colorado

Nov. 22nd, 1929.

Mr. J. Buchhalter, Denver, Colo.

DEAR SIR: I am agreeable that Mr. Morris Block shall receive five hundred dollars ($500.00) for services rendered in connection with the sale of the mill, for which I agree to stand one-half, or $250.00.

(Signed) I. Rude.

Dec. 2, 1929.

Received of Jos. Buchhalter $500.00 as per above statement.

(Signed) M. H. Block

DEFENDANTS' EXHIBIT 8

Denver, Colorado, November 22, 1929.

Inasmuch as a controversy has arisen between I. Rude and J. Buchhalter concerning the proceeds resulting from the sale of their interests in the assets of the Colorado Pulp Mill in which are involved $92,500.00 in bonds of the Colorado Paper Products Company which are now on deposit in the First National Bank of Denver, and the parties are endeavoring to adjust said controversy;

It is therefore agreed, between them that the status quo as to said bonds remain without change for a period of thirty days from this date; that neither party will do any-

thing during that period to interfere with this status quo and that in this connection the firm of Blount, Silverstein & Rosner will, during that period, take no action whatsoever in connection with the agreement between Mr. Buchhalter and Mr. Rude, concerning the balance of fees due [fol. 230] them; nor shall, in the meantime, any action be taken concerning $30,000.00 of said bonds for which the said attorneys gave their receipt to the American National Bank of Denver, covering $30,000.00 of the bonds of Colorado Paper Products Company which were surrendered by said last named bank for the purpose of being utilized in the bid made for the assets of the pulp mill at the special master sale, it being the understanding that all of these matters shall remain in status quo for a period of at least thirty days from this date. Nothing herein shall be construed as any admission of fact.

This arrangement entirely conditional on the payment, when due, of the $4500.00 note, with interest, from J. Buchhalter to said I. Rude, discounted by said Rude with the City National Bank of Dallas, Texas.

(Signed) I. Rude. (Signed) Joseph Buchhalter.
(Signed) Blount, Silverstein & Rosner, by H. S. S.

Witness: (Signed) Charles Rosenbaum.

DEFENDANTS' EXHIBIT 9

Recorded Nov. 16, 1929, at 10:12 o'clock A. M.
Reception No. 154963. Fred O. Pearce, Recorder.

Know all men by these presents, that whereas Joseph Buckhalter, of the City and County of Denver, in the State of Colorado, by his certain Deed of Trust dated the 29th day of August, A. D. 1929, and duly recorded in the office of the County Clerk and Recorder of Adams County, in the State of Colorado, on the 30th day of August, A. D. 1929, in book 180 of said Adams County records, on page 532, and in the office of the County Clerk and Recorder of the County of Gilpin, State of Colorado, on the 10th day of September, 1929, in book 202 of said records, at page 131, conveyed to the Public Trustee in said Adams County certain real estate in said Deed of Trust described, in trust to secure to the order of I. Rude the payment of his certain promissory

note, with interest and all charges thereon, as in said Deed of Trust mentioned; and,

Whereas, Ben Shearston is now such Public Trustee; and, [fol. 231] Whereas, The said Joseph Buchhalter has paid and fully satisfied said note, together with all interest and charges thereon, according to its tenor;

Now, Therefore, At the request of I. Rude, the beneficiary under said Deed of trust and the legal holder of the indebtedness secured by said Deed of Trust, and in consideration of the premises, and in the further consideration of the sum of Two Dollars to me in hand paid by the said Joseph Buchhalter, the receipt whereof is hereby acknowledged, I, Ben Shearston, as Public Trustee in said Adams County, do hereby remise, release, and quitclaim unto him, the said Joseph Buchhalter, and his heirs and assigns forever, all the right, title and interest which I have in and to the said real estate, as such Public Trustee, in said Deed of Trust mentioned, situate, lying and being in the Counties of Gilpin and Adams, State of Colorado, and more particularly described as follows, to-wit:

An undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Gilpin, State of Colorado, to-wit: The North one-half (N. ½) of Section Thirty-six (36), Township One (1) South, Range Seventy-four (74) West of the Sixth Principal Meridian; the Walter A. Placer Mining Claim, and the following lode mining claims: Argo, Snowball Nos. One (1) and Two (2) Mystery, Scranton Nos. One (1), Two (2), Three (3), and Four (4), Caroline M. Little Tootsey, Flying Jib and Reward, said mining claims being situated in Sections Twenty-six (26) and Thirty-five (35), Township One (1) South, Range Seventy-four (74) West of the Sixth Principal Meridian, in Gilpin County, Colorado:

Also an undivided one-fourth (¼) interest in and to the following described real estate, situate, lying and being in the County of Adams, State of Colorado, to-wit: The West one-half (W. ½) of the Southeast quarter (S. E. ¼) of the Southwest quarter (S. W. ¼) of Section Twelve (12), in Township Three (3) South, Range Sixty-eight (68) West of the Sixth Principal Meridian, except a strip of land one hundred (100) feet in width, and six hundred sixty (660) feet, more or less, in length across the entire North end of

the said West one-half (W. ½) of the Southeast quarter [fol. 232] (S. E. ¼) of the Southwest quarter (S. W. ¼) of said Section Twelve (12) being the North one hundred (100) feet of said tract of land; also except all rights of way now occupied for railroads and railroad purposes; and also except rights of way and easements now occupied for ditches and ditch rights, if any there be, together with an undivided one-fourth (¼) interest in and to all improvements, buildings, machinery, equipment, tools, supplies, office furniture and fixtures situated thereon or on any of the above described real estate hereby conveyed, together with an undivided one-fourth (¼) interest in and to the good will of Colorado Pulp and Paper Company, and an undivided one-fourth (¼) interest in and to the waste paper contracts of said Colorado Pulp and Paper Company, and of all of its right, title and interest therein, and of the Receiver of said Company therein, insofar as the rights of said Company, or the Receiver, therein, may be or are assignable; intending to hereby convey, and conveying hereby, an undivided one-fourth (¼) interest in and to all and singular the same property conveyed by that certain Special Master's Deed, dated August 14th, 1929, from George W. Beck, as Special Master, as grantor, to I. Rude and Max Bronst*ein* as grantees, and which said Special Master's Deed was recorded August 15th, 1929, in Book 180, at page 251, of the records in the office of the County Clerk and Recorder of Adams County, Colorado.

To Have and to Hold the Same, Together with all and singular the privileges and appurtenances unto the said Joseph Buchhalter, his heirs and assigns forever. And further, that the said Deed of Trust is, by these presents, to be considered as fully and absolutely released and forever discharged.

Witness my hand and seal this 16th day of November, 1929.

(Signed) Ben Shearston. (Seal.) (Seal.)

Deed of trust and notes exhibited and cancelled.

Mr. Ben Shearston, as the Public Trustee in said Adams [fol. 233] County, please execute this release, the indebted-

ness secured by the above mentioned Deed of Trust having been fully paid.

(Signed) I. Rude, the Beneficiary under said Deed of Trust and the Legal Holder of the Indebtedness Secured by said Deed of Trust.

STATE OF COLORADO,
County of Adams, ss:

I, Helen S. Thompson, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Ben Shearston, as the Public Trustee in said County of Adams, Colorado, who is personally known to me to be the person whose name is subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein specified.

Given under my hand and official seal, this 16th day of November, A. D. 1929. My Notarial Commission expires August 2nd, 1931.

(Signed) Helen S. Thompson, Notary Public. (Seal.)

(Endorsed on back:) 154,963. Release of Deed of Trust. Ben Shearston, Public Trustee. For the use of I. Rude, to Joseph Buchhalter.

STATE OF COLORADO,
County of Adams, ss:

I hereby certify that this instrument was filed for record in my office at 10:12 o'clock A. M. Nov. 16, 1929, and is duly recorded in book 182, page 579.

Fred O. Pearce, Recorder, by (Signed) Geo. L. Bradford, Deputy. Fee, $1.75, Paid.

Mail to J. E. Robinson, 603-607 Ernest & Cranmer Building, Denver, Colo.

15142

STATE OF COLORADO,
County of Gilpin, ss:

I hereby certify that this instrument was filed for record in my office at 2:40 o'clock P. M., November 22, 1929, [fol. 234] and is duly recorded in Book 202, page No. 166.

(Signed) Clifford Parsons, Recorder. (Signed) Bessie E. Hughes, Deputy.

$1.70.

DEFENDANTS' EXHIBIT 11

D. N. B.

No. —.

Denver, Colo., Nov. 19, 1929.

Pay to the order of Jos. Buchhalter $5000.00, five thousend dollars.

To the Denver National Bank, Denver, Colo.

Paid to Blount, Silverstein & Rosner, attorney fees *is* for Rude & Buchhalter.

(Signed) I. Rude.

23—.

Insured against fraudulent alteration.**

(Endorsed on back:) Pay to Blount, Silverstein & Rosner. Jos. Buchhalter. Pay the First National Bank, Denver, Colo., or Order. Blount, Silverstein and Rosner.

(Stamped:) Received payment through the Denver Clearing House 9 Nov. 9. The First National Bank, 20, Colorado.

DEFENDANTS' EXHIBIT 13

Jan. 27, 1930.

Denver, Colorado, January 20, 1930.

First National Bank, Denver, Colorado.

GENTLEMEN: You are hereby respectfully advised that certain difficulties have arisen between Joseph Buchhalter and myself with the respect to the bonds of the Colorado Paper Products Company and moneys derived therefrom which you now hold in escrow subject to the joint direction of myself and Joseph Buchhalter.

You are therefore hereby instructed not to do anything or make any releases in connection with said escrow except on [fol. 235] my written order. You are also hereby respectfully requested to notify me at 1200 Elm Street, Dallas, Texas, and also at 930 University Building, Denver, Colorado, in the event you receive any papers, notice or other information in regard to the above escrow.

Thanking you, I remain,

Very truly yours, (Signed) I. Rude.

DEFENDANTS' EXHIBIT 14

(Western Union Telegraph Blank)

CA 615 50 DL—S1 New York NY 11 244P.

1929, Oct. 11, P. M. 1:04.

Jos. Buchhalter, Roosevelt Hotel, Denver, Colo.:

Not getting further particulars about Becks accounting and if deal closed with Binstock shall I come through Denver Am needing money to pay for heavy purchases therefore anxious to know how soon can expect money through sale Please answer tonight Dont forget to fast and pray for me too Regards.

I. Rude.

DEFENDANTS' EXHIBIT 15

Exhibit A

Denver, November 19th, 1929.

I. Rude and J. Buchhalter, Denver, in account with Blount, Silverstein & Rosner, attorneys and counsellors, Equitable Building.

To Professonal Services

To services rendered in re Colorado Pulp and Paper Company receivership case, bankruptcy matters, etc., etc.

To services rendered in the Receivership Case, and in the Bankruptcy Matters (Exclusive of the Accounting on the part of J. Buchhalter and the Writ of Error on same to the Supreme [fol. 236] Court) chargeable to I. Rude and J. Buchhalter and Aaron Bronstine, as per itemized statement rendered $11,500.00

To services rendered to date in the Accounting of Joseph Buchhalter and Writ of Error on same to the Supreme Court, services in connection with the Master's Sale, and subsequent

sale of interests of I. Rude and J. Buchhalter, etc. etc., Exclusive of Services separately charged to I. Rude and Max Bronstine, and already paid for jointly to the firms of Van Cise and Robinson, and Blount, Silverstein & Rosner)	8,500.00
Previously paid on the above accounts	$20,000.00
	4,334.78
Balance due	$15,665.22

Which balance is hereby settled in the sum of $15,000.00; Paid $5,000.00 in cash, and the balance to be paid either in cash within ten days or by the giving of two notes in the sum of $5,000.00 each, payable in six months and one year, and with interests at 6% per annum.

O. K.

(Signed) I. Rude, (Signed) J. Buchhalter.

The receipt of the $5,000.00 in cash is hereby acknowledged.

(Signed) Blount, Silverstein & Rosner, by H. S. Silverstein.

DEFENDANTS' EXHIBIT 16

Denver, Colorado, Nov. 18, 1929.

Received of the First National Bank of Denver, Colorado, $28,080.56 Twenty-eight thousand eighty & 56/100 Dollars, representing all Cash Collected in accordance with Escrow Agreement #B 392.

(Signed) Joseph Buchhalter, (Signed) I. Rude.

[fol. 237] ORDER SETTLING STATEMENT OF EVIDENCE

The above and foregoing condensed statement of the evidence (inclusive of the exhibits set forth in the appendix thereto) is hereby in all things approved. Those parts thereof in question and answer form are desired by either

appellant or appellee and are permitted under direction of the court.

Dated this 8th day of June, A. D. 1931.

By the court:

J. Foster Symes, Judge.

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING RETURN DAY—June 17, 1931

This cause comes on now to be heard, and thereupon, for good cause shown.

It is ordered by the court that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Tenth Circuit be, and the same is hereby enlarged and extended for thirty (30) days.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 18, 1931

Your petitioner, I. Rude, the above named plaintiff, conceiving himself aggrieved by the decree made and entered on the 7th day of April, A. D. 1931, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Tenth Circuit for the reasons specified in his assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Tenth Circuit.

And your petitioner respectfully shows unto the court that Joseph Buchhalter, one of the defendants in the above entitled cause, has been allowed an appeal from said decree; [fol. 238] that pursuant to Equity Rule 75 the said Joseph Buchhalter on or about the 13th day of April, A. D. 1931, filed herein a Praecipe for Record on Appeal wherein he indicated the portions of the record to be incorporated into the transcript on his said appeal.

And accordingly, your petitioner prays that, by order entered herein, it be directed that the transcript of the record, proceedings and papers, designated in said Praecipe and which have been or will be transmitted by the Clerk of this court to said United States Circuit Court of Appeals for the Tenth Circuit, be supplemented by the portions of the record herein, indicated by your petitioner's Praecipe for Record on Appeal, this day filed herein, and that said record, proceedings an papers, so supplemented, be treated, considered and duly authenticated as the transcript of the record, proceedings and papers upon which this, your petitioner's appeal, is based, and transmitted to said United States Circuit Court of Appeals for the Tenth Circuit for its consideration in connection with your petitioner's appeal.

Dated at Denver this 18th day of June, A. D. 1931.

Ernest Morris, Attorney and Solicitor for Plaintiff-Appellant, I. Rude.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FOR USE OF TRANSCRIPT

In this cause, on motion of counsel for the plaintiff, and it appearing to the court that the above plaintiff has heretofore filed herein his petition for the allowance of an appeal, and concurrently therewith his assignment of errors;

It Is Ordered:

1. That an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, from the decree in this cause made and entered on the 7th day of April, A. D. 1931, be and the same is hereby allowed to said plaintiff;

2. That the transcript of the record, proceedings and papers, designated in Praecipe for Record on Appeal filed herein on or about April 13, A. D. 1931, by the defendant, Joseph Buchhalter, and which have been or will be trans-[fol. 239] mitted by the Clerk of this Court to said United States Circuit Court of Appeals for the Tenth Circuit, be

supplemented by those portions of the record herein, indicated by Plaintiff's Praecipe for Record on Appeal filed herein on the 18th day of June, A. D. 1931, and that said record, proceedings and papers, so supplemental, be treated, considered and duly authenticated as the transcript of the record, proceedings and papers upon which said plaintiff's appeal is based and transmitted to said United States Circuit Court of Appeals for the Tenth Circuit for its consideration in connection with plaintiff's appeal;

3. That the bond on plaintiff's said appeal be, and the same is hereby, fixed at $750.00.

Done at Denver this 18 day of June, A. D. 1931.

J. Foster Symes, Judge.

[Bond on appeal in the sum of $750, approved by the District Judge, with Appellant I. Rude as principal and Max Meyer and Augusta Weinberg, as sureties, was filed in the District Court on June 18, 1931.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 18, 1931

Comes now the above plaintiff and respectfully shows unto the court that there is manifest error in the judgment and decree made by the District Court of the United States for the District of Colorado on the 7th day of April, A. D. 1931, from which said judgment and decree this appeal is prosecuted and said plaintiff files the following assignment of errors all committed over the objections and exceptions of plaintiff, upon which errors he will rely upon his prosecution of this said appeal:

I

The said decree is contrary to the evidence for that the overwhelming weight of the evidence establishes Buchhalter's agreement to pay plaintiff cash, as alleged in the bill, and establishes the equitable lien prayed for in the bill.

[fol. 240] II

Said decree is contrary to the law, in that the evidence clearly establishes plaintiff's right to judgment against Buchhalter and a decree establishing and foreclosing plaintiff's equitable lien on the property in escrow in the bank, all as prayed for in the bill.

III

The said court erred in finding that the escrow agreement mentioned in its Findings of Fact has never been modified by plaintiff and defendant Buchhalter.

IV

Said court erred in concluding as a matter of law that the bill herein should be dismissed on the merits as to all of the defendants.

V

Said court erred in concluding as a matter of law that all costs herein should be taxed to plaintiff.

VI

Said court erred in failing and refusing to find that defendant Buchhalter is indebted to plaintiff, as alleged in the bill herein.

VII

Said court erred in failing and refusing to render judgment against Buchhalter and to decree a lien in favor of plaintiff as prayed for in said bill.

VIII

Said court erred in excluding from the evidence herein plaintiff's Exhibit L which is a letter written November 4, 1929, by Rude to Buchhalter and received by the latter wherein Rude requests that, if the mill déal is closed and the money paid over, Buchhalter have the bank send him a draft on account of the note and suggests that possible Buchhalter can make a deal with the bank to pay Rude the balance, and also asks if there will be some profit to help pay attorneys in the final Mill Settlement.

IX

Said court erred in excluding from the evidence herein [fol. 241] plaintiff's Exhibit O which is a receipt dated May 16, 1929 wherein Buchhalter acknowledges receipt from Rude of Forty (40) shares of Manufacturers Trust Co. stock and agrees to return same on demand.

X

The court erred in receiving in evidence defendants' Exhibit 1 which is a letter dated August 29, 1929, written by Rude to Bronstine and setting forth a number of grievances which Rude has against Bronstine on account of the latter's conduct of the Paper Mill.

XI

The court erred in receiving in evidence defendant's Exhibit 2 which is a letter dated August 30, 1929, from Rude to Bronstine complaining of Bronstine's conduct of the Paper Mill and his treatment of Rude as a part owner and advising that Rude has conveyed a one-half interest in the Mill to Buchhalter.

XII

The court erred in receiving in evidence defendants' Exhibit 5 which is a letter dated December 7, 1929, written by Rude to Mrs. J. Buchhalter in which Rude asks her to use her influence with her husband, Joseph Buchhalter, to convince him that he is doing wrong towards Rude and that Mr. Buchhalter should settle with Rude and avoid court action and the attended notoriety.

XIII

The court erred in receiving in evidence defendants' Exhibit 11, which is a check dated November 19, 1929, drawn by Rude on the Denver National Bank in the sum of $5,000.-00, payable to Joseph Buchhalter and by him endorsed payable to Blount, Silverstein and Rosner and paid by the bank. On the face of the check are these words, "Paid to Blount, Silverstein & Rosner attorneys fees for Rude & Buchhalter."

XIV

The court erred in excluding the testimony of Mrs. Isham, offered by plaintiff, to the effect that, at a trial before a justice of the peace in Adams County, defendant Buchhalter had testified under oath that he had bought out Mr. [fol. 242] Rude, that Rude had no more interest in the Mill as an owner, and that he (Buchhalter) was the owner of the Paper Mill.

XV

The court erred in excluding the testimony of Charles B. Myers, offered by plaintiff, to the effect that the defendant Buchhalter had told him that he had bought Mr. Rude's interest in the Mill, that Rude was out of it, and that he (Buchhalter) was the owner of all of Mr. Rude's interest.

XVI

The court erred in excluding from evidence the testimony of the plaintiff Rude, offered by him, to the effect that the proffered testimony set forth under Assignments XIV and XV hereof was all unknown to him at the time this cause was theretofore being tried, said unknown testimony being that Buchhalter had testified at Brighton and had told Charles B. Myers in Denver that he (Buchhalter) had bought Rude's interest in the Mill.

XVII

The court erred in receiving the testimony of the defendant David Rosner as to conversations and oral statements between plaintiff and defendant Buchhalter and defendants Blount, Silverstein and Rosner, at and before the making and delivery of the promissory note and deed of trust mentioned in the bill, said testimony being to the following effect:

(1) That on August 28, 1929, plaintiff stated that he wanted to give a mortgage and note to Buchhalter because plaintiff was worried and Mr. Bronstine was liable to bring a partition suit in relation to the Paper Mill.

(2) That at said time Plaintiff stated there wasn't going to be any consideration for such note and mortgage, that it was merely a fictitious note and mortgage for the pur-

pose of stopping any lawsuit Mr. Bronstine might bring against Mr. Rude.

(3) That at said time both Rude and Buchhalter asked Rosner's opinion on that and that Rosner told them he wouldn't agree with them wouldn't draw a mortgage or note of that type for them.

(4) That next morning, August 29, 1929, when Rude. [fol. 243] Buchhalter, Rosner, Silverstine and part of the time Blount, were present plaintiff stated again that he wanted to make the mortgage and note to Buchhalter; that Rosner and Silverstein informed him that that would be of no value, it was purely for a fictitious purpose and intended to stop any lawsuit Bronstine might bring against Rude; that such was the purpose of the note and mortgage that morning; that later that morning Rude and Buchhalter returned to the office of the witness Rosner and then plaintiff stated he was going to give that note and mortgage to Buchhalter regardless of the opinion of Rosner and Silverstein; that plaintiff then said, "No, Joe, (meaning Buchhalter) you better give me the note and mortgage, the reason being that I want you to give me the note and mortgage is because I am in business in Dallas and I have to make a report to Dun and Bradstreet. You are not in active business, and it will hurt my credit;" that they thereupon reversed the process and then the mortgage and note were drawn in accordance with that arrangement; that first Rude talked and then Buchhalter talked and both of them stated the purpose of this note and mortgage was purely to stop any lawsuits that Mr. Bronstine might bring against Mr. Rude.

XVIII

The court erred in denying plaintiff's motion to strike out all of the testimony mentioned in Assignment XVII hereof, said testimony being to the effect that the note and mortgage were not to be binding obligations but merely to forestall a threatened suit to partition the Paper Mill Property.

XIX

The court erred in sustaining objection to the following question propounded by plaintiff to the witness Rosner:

"Can you tell the court as an attorney at law * * * what would have been the invalidity of Mr. Rude giving a mortgage to Mr. Buchhalter for $67,500.00?"

XX

The court erred in refusing to permit inquiry of the witness Rosner as to whether he wanted the court to believe that his (Rosner's firm) representing Max Bronstine, Mr. Buchhalter and Mr. Rude, prepared a mortgage which he (Rosner) says is fictitious.

[fol. 244] XXI

The court erred in admitting testimony of the defendant Blount concerning conversations and statements of plaintiff or in his presence to the effect that, prior to execution of said note and trust deed the following was said:

That Silverstein told Blount in the presence of Rude and Buchhalter, that Rude and Bronstine were the owners by purchase at receiver's sale of the assets of the Colorado Pulp and Paper Company, each having a half interest as shown by the record and that they had been having trouble between themselves and that Bronstine was threatening to start a partition suit; that Rude and Buchhalter had figured out a plan of combatting Bronstine and such plan was that Rude would transfer his title to an undivided one-half interest in this property to Buchhalter and the latter would give Rude a mortgage back so that the title would be complicated in the event that Mr. Bronstine sought to partition the property and that they asked his (Blount's) advice about it; that he (Blount) advised against it, told them it was nothing but subterfuge and in his opinion a constructive fraud; that if they got into a lawsuit with Bronstine the whole plan would come out and that he (Blount) thought it was a useless and a foolish thing to do; that thereupon Rude and Buchhalter said they couldn't see his (Blount's) point of view; that they thought it was perfectly legitimate for them to put up this trick on Bronstine because he had not acted honorably and straight with them in connection with handling the Paper Mill; that Rude and Buchhalter told him (Blount) that they wanted to carry out the foregoing plan and record the papers so that the whole transaction would show on its face a transfer of the

title to Buchhalter by Rude and the giving of a mortgage back to secure the note; that both Rude and Buchhalter said that the object of giving the note and mortgage and the deed was to fool Bronstine.

XXII

The court erred in admitting testimony of the witness Rosenbaum as to a conversation with plaintiff and defendant Buchhalter the morning of August 29, 1929, to the following effect:

That plaintiff and Buchhalter came to the office of witness and explained that they were having difficulty with [fol. 245] Bronstine over the Mill, that they wanted to substitute Buchhalter for Rude as the half-owner of the Mill because he, Buchhalter, felt he could deal more advantageously with Bronstine than Rude could and could either force Bronstine to buy out the other half-interest or in some way work jointly and that they stated that if this was done they were afraid Bronstine would file suit to partition the property, and that Bronstine was in a better position to bid in the property at a partition sale than they might be; that they stated they therefore wanted a mortgage drawn representing approximately their joint investment and that it was their plan to give the mortgage to Rude; that they asked Rosenbaum if he would draw such a mortgage and also whether or not in a partition sale the property would have to be bid in subject to the mortgage or whether the mortgagee, being a non-resident of the State, could be made a party defendant; that the witness advised against the mortgage and refused to draw it but agreed to look up the law respecting the rights of a non-resident mortgagee in a partition suit; that they stated they wanted to make the mortgage so that if the property were bid in by Bronstine and he were compelled to pay the mortgage, he would have to pay out an amount sufficient to reimburse both Rude and Buchhalter for their investment.

XXIII

The court erred in admitting testimony of the defendant Buchhalter substantially to the same effect as that of the defendant Rosner set out in assignment XVII hereof, namely, that the note and mortgage were for a fictitious

purpose and merely to forestall a threatened suit by Bronstine to partition the Paper Mill property.

XXIV

The court erred in admitting testimony of the defendant Buchhalter substantially to the same effect as that of the witness Rosenbaum set out in assignment XXII hereof, namely, that Rude and Buchhalter had stated to Rosenbaum that they wanted to place a mortgage on the Mill property for an amount substantially equal to their combined investment therein as a protection against a threatened suit by Bronstine to partition said property.

XXV

The court erred in admitting testimony of the defend- [fol. 246] ant Buchhalter as to conversation at or about the time the mortgage and note were given, to the following effect:

That Rude stated to Silverstein that the amount of the note and mortgage should be $67,500.00 and that Buchhalter should give Rude a letter stating that Buchhalter had paid Rude $7500.00 in cash, because it would look funny to sell without a dollar down; that the arrangement was that Buchhalter was also to mortgage the other quarter interest for a like amount.

XXVI

The court erred in admitting testimony of the defendant Buchhalter as to further conversation contemporaneous with the giving of the note and mortgage and in substance as follows:

That Silverstein told Rude he had better give Buchhalter a letter showing that the note and mortgage would never be used against Buchhalter; that Rude stated he and Buchhalter had been doing business a long time and "I don't want to give you a letter in case they make me swear that this was not a real sale;" that Buchhalter said to Rude, "you are the only man in the world that I would give a note like this, and I am giving it to you on the sole condition that you are not to enforce it against me or any one of my family."

XXVII

The court erred in refusing to strike out the testimony of defendant Buchhalter set forth in assignments XXIV, XXV and XXVI hereof, namely as to parol evidence to the effect that the note and mortgage were not to be binding obligations; that they were merely to be used to force Bronstine to buy Rude's and Buchhalter's interest in the Mill and to forestall a threatened partition suit which Bronstine might bring if he did not purchase such interest.

XXVIII

The court erred in sustaining objections to questions propounded to defendant Buchhalter by plaintiff and in substance as follows:

As to whether he (Buchhalter) was sworn as a witness in September, 1929, before Justice Kinsell in Brighton and as to whether he (Buchhalter) testified at that time that he [fol. 247] had bought out Rude and was the owner of all interest in the Mill which Rude theretofore had.

XXIX

The court erred in refusing to strike testimony of the defendant Silverstein substantially the same as that of Blount, Rosner and Buchhalter as to conversations on August 29, 1929, and set forth the in assignments XVII (4), XXI and XXVI hereof, said testimony being to the effect that Rude and Buchhalter stated they wanted the note and mortgage given to force Bronstine to buy their interest in the Mill or to guard against a partition suit which Bronstine might bring if he did not so buy; that Silverstein and other members of his firm advised against this plan; that the note and mortgage were not to be enforced but were to be cancelled in case Bronstine so bought or did not bring the partition suit.

XXX

The court erred in refusing to strike testimony of the defendant Silverstein in substance as follows:

That Rude and Buchhalter stated that the purpose of the note and mortgage was to make a deal to sell their interest in the Mill and to delay a partition suit if Bronstine brought one; that Rude stated that Buchhalter need not

worry, that in case a deal was made or no partition suit brought, he would cancel the note and it would never be used.

XXXI

The court erred in sustaining objection to the question propounded to defendant Silverstein by plaintiff and to the following effect:

Referring to the making of the deeds and mortgage, "You knew that Mr. Rude didn't intend to make Mr. Buchhalter a present of his interest in the Mill, didn't you?"

XXXII

The court erred in sustaining objection to the following question asked defendant Silverstein by plaintiff:

"Mr. Silverstein, did you intend to prepare instruments in the shape of a note and deed of trust that had no validity?"

[fol. 248] XXXIII

The court erred in rejecting the following testimony which plaintiff offered to introduce through the witness Beck:

That in the summer of 1929 when the question came up relative to the sale of the Paper Mill, the witness had a conversation with Buchhalter wherein Buchhalter stated that he would transfer the securities pertaining to the Paper Mill to any purchaser Mr. Beck might produce therefor; that Mr. Beck asked Mr. Buchhalter how about Mr. Rude's interests, to which Mr. Buchhalter reported that, "Mr. Rude will do anything that I ask him to relative to the transfer of the interest."

XXXIV

The court erred in rejecting the following evidence which plaintiff offered to prove by the witness Binstock:

That Buchhalter first made him a proposition for sale of a one-half interest in the Paper Mill assets which was in effect the same proposition on which the contract, Exhibit G, was finally signed; that thereafter Buchhalter went to Binstock and stated that he couldn't go through with the proposition; that Mr. Rude wanted all cash for his interest

in the Mill; that he would have to have at least $10,000.00 more cash than Mr. Binstock had agreed to pay, for the reason, as Buchhalter stated, that Rude wanted all cash, and that he further stated that he had to pay Mr. Rude at least $40,000.00 cash in the deal.

XXXV

The court erred in sustaining objection to the following question propounded to the plaintiff Rude:

"What did he (Buchhalter) tell you as to the manner in which he acquired his interest in the property?"

XXXVI

The court erred in sustaining objection to the following question propounded to the plaintiff Rude:

"State whose idea it was to put the mortgage on."

XXXVII

Referring to a telephone conversation which took place between Rude in New York and Buchhalter in Denver, [fol. 249] plaintiff's counsel asked plaintiff, while a witness in his own behalf, why he called up Buchhalter by telephone and what the telephone conversation was. The court erred in sustaining objection to this question.

XXXVIII

Pursuant to permission of the court, plaintiff filed a written offer of proof of said telephone conversation, said offer being as follows:

"Plaintiff offers to show by his testimony that the sole object and purpose of his communication with the defendant Joseph Buchhalter by long distance telephone from New York City to Denver on October 16th, 1929, was to explain to the said Buchhalter the reason that plaintiff had sent the note for Sixty-seven Thousand Five Hundred Dollars ($67,500.00) to the Denver National Bank of Denver.

"That in said conversation plaintiff told defendant Buchhalter that he did not send the note to Mr. Silverstein, as requested, because he preferred, and thought it would be safer, to have it handled by the Bank; that defendant

Buchhalter then stated to plaintiff that he was right and requested plaintiff to have the note sent to the First National Bank of Denver, which plaintiff said he would do.

"That nothing further was discussed in said telephone conversation and that pursuant to said telephone conversation plaintiff sent a telegram to the Denver National Bank of Denver, which said telegram is designated herein as Exhibit 1-7. The court erred in rejecting the foregoing offer.

XXXIX

The court erred in denying plaintiff's petition for a rehearing.

XL

The court erred in sustaining objection to the following question propounded to defendant Buchhalter by plaintiff:

"Mr. Buchhalter, it is true that Mr. Rude entrusted to you forty shares of the corporate stock of the Manufacturers Trust Company, did he not?"

XLI

The court erred in sustaining objection to the following question propounded to defendant Silverstein by plaintiff:

[fol. 250] "I will ask you whether it is not a fact that the telegram which the Denver National Bank sent to Mr. Rude was first submitted to you before it was sent?"

XLII

The court erred in sustaining objection to the following question propounded by plaintiff to the defendant Silverstein:

"Yes, and you recollect that Mr. Morrison informed you at that time (about October 16, 1929) that Mr. Rude's instruction to the Denver National Bank was that he should have at least $40,000.00 in cash? Was that communicated to you?"

XLIII

The court erred in sustaining objection to plaintiff's offer to prove by D. M. Waldman that the general reputation of

the defendant Joseph Buchhalter in the community where he resides for truth and veracity is bad.

XLIV

The court erred in sustaining objection to the following question propounded to the plaintiff Rude by his counsel:

"Now, at that time (August 14, 1929) did you have any bonds or security that belonged to Joseph Buchhalter?"

XLV

The court erred in refusing plaintiff permission to prove by his own testimony that he did not have possession of the Mill property or any interest of Mr. Buchhalter to exceed thirty-six hours.

XLVI

The court erred in refusing to grant any relief to the plaintiff.

Wherefore Plaintiff prays that each and every of the foregoing assignments of error be sustained; that said decree of the District Court be reversed, said errors corrected and plaintiff awarded the relief prayed for in his bill.

Ernest Morris, Attorney and Solicitor for Plaintiff-Appellant.

[fol. 251] In United States District Court

Notice—Filed June 8, 1931

To the above-named defendants and appellees, Joseph Buchhalter, the First National Bank of Denver, a banking corporation, and G. Dexter Blount, Harry Silverstein, and David Rosner, co-partners, doing business as Blount, Silverstein & Rosner:

Please take notice that on this the 18th day of June, A. D. 1931, the above named plaintiff, I. Rude as appellant, by his attorney, in the cause above entitled, hereby adopts as a condensed statement of the evidence in said cause to be used by said I. Rude, appellant on appeal herein, the condensed statement of the evidence which was approved by

said court and filed herein on the eighth day of June, A. D. 1931.

You are further advised and notified, pursuant to the Equity Rule applicable thereto, that said statement is subject to your examination and, further, that the said I. Rude, appellant, will on June 29, A. D. 1931, at the hour of 9:30 o'clock a. m., or as soon thereafter as counsel can be heard, ask that said condensed statement of the record so filed and approved be ordered by said District Court to be transmitted to the United States Circuit Court of Appeals for the Tenth Circuit as a part of the record to be considered by said court on plaintiff's said appeal.

Dated at Denver, Colorado, this 18th day of June, A. D. 1931.

Ernest Morris, Attorney for I. Rude, Appellant.

Received a copy of the above and foregoing notice this 18th day of June, A. D. 1931.

Hughes & Dorsey, Montgomery Dorsey, Attorneys for the First National Bank of Denver, Appellee.
Henry E. Lutz, Attorney for G. Dexter Blount, Harry Silverstein, and David Rosner, Co-Partners, Doing Business as Blount, Silverstein & Rosner, and Joseph Buchhalter, Appellees.

[fol. 252] IN UNITED STATES DISTRICT COURT

NOTICE—Filed June 18, 1931

To the above-named defendants and appellees, Joseph Buchhalter, the First National Bank of Denver, a banking corporation, and G. Dexter Blount, Harry Silverstein, and David Rosner, co-partners, doing business as Blount, Silverstein & Rosner:

Please take notice that on this the 18th day of June, A. D. 1931, the undersigned appellant in the above entitled cause has filed Plaintiff's Præcipe for Record on Appeal with the Clerk of the District Court of the United States for the District of Colorado, at said Clerk's office in Denver, Colorado, indicating the portions of the record to be incorporated into

the transcript on such appeal, a copy of which said præcipe is served herewith.

Dated at Denver this 18th day of June, A. D. 1931.

Ernest Morris, Attorney for I. Rude, Appellant.

Received a copy of the foregoing notice, together with a copy of said Præcipe therein mentioned, this 18th day of June, A. D. 1931.

Hughes & Dorsey, Montgomery Dorsey, Attorneys for the First National Bank of Denver, Appellee.
Henry E. Lutz, Attorney for G. Dexter Blount, Harry Silverstein and David Rosner, Co-partners, Doing Business as Blount, Silverstein & Rosner, and Joseph Buchhalter, Appellees.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PRÆCIPE FOR RECORD ON APPEAL—Filed June 18, 1931

Comes now the above named plaintiff I. Rude, the appellant herein, by Ernest Morris, his attorney, and respectfully requests the clerk of this court to prepare a record on appeal herein to the United States Circuit Court of Ap-[fol. 253] peals for the Tenth Circuit, the same to consist of the matters following, to-wit:

I

Plaintiff requests, but does not desire to have duplicated, all those portions of the record hereinafter designated and which have been prepared, or are being prepared, pursuant to that certain Præcipe for Record on Appeal filed herein on or about the 13th day of April, A. D. 1931, by the above named defendant, Joseph Buchhalter, said portions of the record desired by plaintiff being more particularly designated as follows, to-wit:

Bill of Complaint.
Answer of Defendant, Buchhalter.
Answer of Defendants, Blount, Silverstein & Rosner.
Answer of Defendant, The First National Bank.
Order, Dated July 17, 1930, re Final Hearing of Evidence to Adjournment.

Order, Dated September 25, 1930, re Final Hearing of Evidence to Adjournment.

Order, Dated September 26, 1930, re Final Hearing of Evidence to Adjournment.

Order, Dated November 5, 1930, re Final Hearing of Evidence to Adjournment.

Order, Dated November 6, 1930, re Final Hearing of Evidence to Adjournment.

Order, Taking Case Under Advisement.

Judge's Memorandum.

Order, Permitting the filing of Petition for Rehearing.

Petition for Rehearing, and ruling thereon.

Findings of Fact and Conclusions of Law as entered.

Final Decree.

Condensed Statement of Evidence, and Court's approval thereof.

Clerk's Certificate to Record.

[fol. 254] II

And said I. Rude, appellant, respectfully requests the Clerk of this court to supplement said record hereinabove indicated by preparing and adding thereto the following matters to-wit:

Plaintiff Rude's Petition for Appeal.

Order allowing said appeal and for use of transcript.

Citation on said plaintiff's appeal and acceptance of service thereof.

Plaintiff Rude's bond on Appeal.

Plaintiff Rude's Assignment of Errors.

Notice to defendants re Condensed Statement of Evidence and Acknowledgment of Service Thereof.

Notice to defendants of the filing of this, Plaintiff's Præcipe for Record on Appeal and acknowledgment of service thereof.

Copy of this, Plaintiff's Præcipe for Record on Appeal.

Clerk's Certificate to Entire Record, that designated under Paragraph I hereof, as well as that indicated in this Paragraph II.

Dated this 18th day of June, A. D. 1931.

Ernest Morris, Attorney for Plaintiff and Appellant, I. Rude.

[On April 14, 1931, there was filed in the District Court a citation in proper form directed to Appellee I. Rude, with acknowledgment of service by counsel for said appellee endorsed thereon; and on June 18, 1931, there was filed in said court a citation in proper form directed to Appellees Joseph Buchhalter, The First National Bank of Denver, a Banking Corporation, and G. Dexter Blount, Harry Silverstein and David Rosner, Co-Partners doing business as Blount, Silverstein & Rosner, with acknowledgment of service by counsel for said appellees.]

[fol. 255] Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed Jan. 30, 1931

I. Rude brings this action in equity against Joseph Buchhalter, principal defendant, and others. He seeks to establish a first and prior lien on $90,000 par value first mortgage bonds of the Colorado Pulp & Paper Company and $251.72 in cash, held by the First National Bank of Denver pursuant to an escrow agreement, dated November 15, 1929 between Rude and Buchhalter, instructing the bank to hold the said assets until they should agree in writing concerning the disposition thereof.

Briefly, the bill alleges: That on August 29, 1929, complainant Rude deeded to Buchhalter his undivided one-fourth interest in certain real and personal property known as the Colorado Pulp & Paper Company, and in return Buchhalter delivered to Rude his promissory note for $67,500 at 8%, due in six months, secured by a trust deed on said [fol. 256] property. That Buchhalter, who already owned a one-fourth interest in the same, agreed to pay Rude one-half of the profits realized from any sale he might make of the whole one-half interest, up to $7500.00.

Next, that Buchhalter made a sale of this one-half interest to one Binstock, and in order to carry it out, the Buchhalter note and the deed of trust were deposited by Rude in the First National Bank of Denver with instructions to turn the

same over to Buchhalter's purchaser for cancellation and release upon the payment to the bank of the proceeds of the sale, the same to be held until Buchhalter and Rude should agree in writing as to the disposition thereof. Accordingly, on November 15, 1929, the bank delivered said instruments, and received in exchange $28,080.50 in cash and $92,500 first mortgage bonds of the paper company aforesaid. These allegations are in the main admitted.

It is next alleged that on November 18, 1929 Rude and Buchhalter made an oral agreement while at the First National Bank, to the effect that Rude would pay Buchhalter at once $67,500, being the face of the said note, plus interest, and in addition $7500.00, one-half of the profits heretofore mentioned, with interest at 8%, from the date of the sale, to-wit, October, 1929, and that the bonds aforesaid would be held by the bank as collateral security, to secure said payments to Rude, and thereafter be delivered to Buchhalter.

That it was further agreed that the $28,080.50 was to be withdrawn from the escrow and divided on the basis of $16,365.34 to Rude, and $11,615.22 to Buchhalter, and he would thereupon pay a note of his due the bank and release and sell certain collateral and pay Rude the balance of $59,-699.61 alleged to be due. It is alleged he did this, but failed to pay Rude. That the bank claims a lien on said funds in the amount of $1250.00, but that the same is secondary to the lien of the plaintiff; that the defendants Blount, Silverstein & Rosner on March 11, 1930, garnisheed the interest of Buchhalter and Rude in said escrow, but that the said garnishment is secondary to that of the plaintiff.

Further, that the parties are unable to agree in writing concerning the disposition of the cash and bonds, and that the bank refuses to recognize the plaintiff's lien, and to sell the bonds for the purpose of satisfying the same.

[fol. 257] Plaintiff prays for judgment in the sum of $59,-699.61, for an equitable lien on the assets in the escrow, and that the bank be directed to sell the bonds and pay the plaintiff the amount claimed to be due.

Buchhalter, in his answer, admits the transfer of Rude's quarter interest to him was to enable him to more easily sell the property during Rude's absence from Denver; that the note and deed of trust referred to were executed, but were fictitious; did not represent any indebtedness owing by Buchhalter to Rude, and were given simply for the purpose

of obtaining a possible advantage over Max Bronstine, the owner of the other half interest, with whom they anticipated trouble.

Buchhalter denies any agreement to pay Rude one-half, or any, of the profits as alleged, and says that as a matter of fact no profits were realized; that the only agreement that ever existed between the parties was that in the event of a sale they would share equally in the proceeds; that at all times the parties had an equal one-half interest in the properties mentioned; that the property was sold to Binstock with Rude's consent, and in order to complete the same he surrendered his note and deed of trust to the First National Bank with directions to retain the proceeds of the sale, subject to the written directions of the plaintiff and Buchhalter. He admits the cancellation of the note and deed of trust on November 15, 1929, and the delivery of the cash and bonds to the bank, subject to the escrow. He denies the agreement alleged to have been entered into at the bank, or that he ever agreed to pay Rude the $67,500 note, or any part of it, or any $7500.00; that the latter was a fictitious amount named as a part consideration to be exhibited to Bronstine and his associates.

In respect to the $28,080.50 drawn down by the parties, Bronstine alleges that Rude was to pay Blount, Silverstein and Rosner $5,000 out of his share, on account of attorney's fees.

He admits the parties have been unable to agree as to the disposition of the property, due, he says, to the fraudulent conduct of Rude is attempting to force Buchhalter to give him a larger share of the proceeds than he is entitled to.

The defendants, Blount, Silverstein & Rosner filed an an-
[fol. 258] swer, alleging the said note and deed of trust were wholly without consideration, were given on the understanding alleged by Buchhalter, and were never to pass out of Rude's possession. They admit they have garnished the First National Bank and deny knowledge of Rude's alleged lien.

The First National Bank admits that it holds the bonds and cash until such time as Rude and Buchhalter agree in writing as to the disposition of the same; allege that on January 2, 1930 Buchhalter assigned to the bank his interest in the escrow agreement to the extent of $1250.00, and ask that the said assignment be declared a first and prior

lien on Buchhalter's interest, and for instructions as to the disposition of the cash and bonds.

The evidence establishes that Rude and Bronstine became joint bidders at a special master's sale of the Colorado Pulp & Paper Company on June 6, 1929; that on August 29, 1929 Rude was the owner of a one-fourth interest in the property, and in addition held in trust for Buchhalter another quarter interest, the remaining one-half being owned by Bronstine and associates. At this time Rude's investment, including interest, was $67,500, and that of Buchhalter $53,992.00. Rude and Bronstine had agreed that the former should control the management and that Buchhalter should have no interest therein. After the purchase of the property at the special master's sale, Bronstine, with Rude's consent, took over the active management of the plant.

Difficulties soon arose between Bronstine and Rude, and Rude and Buchhalter desired to sell out. Rude and Buchhalter agreed to enter into a campaign against Bronstine to force him to buy them out the negotiations to be carried on by Buchhalter. To bring this about Rude conveyed his half interest to Buchhalter by special warranty deed and recited a consideration of $75,000. Buchhalter gave back to Rude the $67,500 note and deed of trust in order to embarrass Bronstine in the event he should bring a partition suit. Before executing these instruments, however, the parties discussed the matter with the attorneys, Charles Rosenbaum, Davis B. Rosner, Mr. Silverstein and Mr. Blount. These gentlemen advised against the execution of a fictitious note and mortgage, stating they would be of no avail in case [fol. 259] of litigation with Bronstine. Rude and *Bronstine* went ahead notwithstanding.

About this time Mr. Buchhalter wrote the following letter to Mr. Rude:

"August 29, 1929.

Mr. I. Rude, Denver, Colorado.

DEAR SIR: In view of the fact that you have this day conveyed to me a one-quarter interest in the mill and plant and property formerly belonging to Colorado Pulp and Paper Company, and which you have been holding in trust for me, and have also conveyed another one-quarter interest, which was your own, and which I have this day purchased from you for $75,000.00 ($7,500.00 in cash and

the balance of $67,500.00 secured by deed of trust on said one-quarter interest), and inasmuch as these transfers were made with the understanding as between us that the contract of May 14th, 1929, between yourself and Max Bronstine has not yet been abrogated or carried out according to its terms, this is to confirm the understanding between us that these conveyances are all subject to that contract between yourself and Max Bronstine, dated May 14th, 1929.

And further, that in the event of any controversy arising, or litigation between you and Max Bronstine, on account of the execution of these deeds, I will save you harmless from any and all damages, including attorneys fees, arising out of any litigation.

Yours very truly, (Signed) Joseph Buchhalter."

Next one Morris Block was consulted in regard to a sale. He stated he had already been negotiating with Binstock and thought the latter might deal on a basis of $38,000 in cash and the balance in bonds, the total price to be $128,000 to $130,000.

Shortly thereafter Mr. Rude, while in New York City, received the following telegram from Harry S. Silverstein, attorney at law:

[fol. 260] "Denver, Colorado, Oct. 12, 1929.

Buchhalter Binstock Contract Signed All Papers delivered to Buchhalter and Placed in Escrow Must Have Note Here to Accompany Your Request Release Trust Deed Not Later Than Wednesday Next Week to Complete Deposit in Escrow Wire Answer."

Rude replied by writing the Denver National Bank as follows:

"I am herewith enclosing Joseph Buchhalter's note dated August 29, 1929, for the sum of $67,500.00 payable six months after date.

Kindly notify Mr. Harry S. Silverstein, Attorney at Law, Equitable Building, that you have this note in your possession.

I have received a telegram from Mr. Silverstein stating that the mill has been sold, but on what terms and condi-

tions, I do not know. Whatever cash the purchaser is paying on the purchase price, I am to receive up to the amount of the note, but not less than $40,000.00. The balance, if any, I am to take a note secured by Mr. Buchhalter, for a period not exceeding one year.

If the note is to be deposited in escrow with the other papers, you may do so with the understanding that the above conditions are to be carried out before surrender of the note.

If there should be any changes in this instruction, I shall write you further.

I intend to leave here for Dallas in a few days. My present address is, Plymouth Hotel, New York City.

Sincerely yours, (Signed) I. Rude."

Thereafter Buchhalter wired Rude in part as follows:

"* * * All Silverstein can give bank now is receipt for note and statement that proceeds both cash and bonds will remain in present escrow subject to your order and will not be drawn down unless approved by you stop wire bank to turn over note upon receipt."

On October 17, 1929, the Denver National Bank wired [fol. 261] Rude the form of telegraphic instructions which they desired from him and he replied accordingly. Thereupon the Denver National Bank turned the Buchhalter note over to the First National Bank, subject to the escrow agreement providing, in part, as follows:

"That we are holding any and all proceeds deposited with us under said contract and escrow instructions until Joseph Buchhalter and I. Rude have agreed in writing concerning disposition of said proceeds."

The sale was consummated and the proceeds turned over to the bank. The Buchhalter note of $67,500 and deed of trust securing the same were surrendered, cancelled and released.

Rude arrived in Denver November 18, 1929, and with Buchhalter went immediately to the bank to take down the money. The matter was handled on behalf of the bank by Mr. Rogers, one of the vice-presidents. Mr. Rude testified that while discussing their affairs with Mr. Rogers, the

latter left them temporarily to obtain the papers, and that during his absence of a few minutes—not over five or ten—he and Buchhalter agreed orally that Buchhalter would pay Rude the note of $67,500 in full; that the $28,080 then on hand would be paid to Rude on account thereof, except that $11,000 would be paid Buchhalter to enable him to pay his personal note to the bank, so that he could take down some collateral which he was to sell on the following day and use the proceeds to pay the balance due Rude; that until the payment was made the next day the bonds, which were then in the bank, would remain there as security for this alleged payment of $67,500, plus $7,500.00, which Rude claims Buchhalter had agreed to pay him as representing his one-half of the profits from the sale of the paper mill.

This alleged oral agreement testified to by Rude is the crux of the controversy, and what he really seeks in this suit is damages for a breach thereof, and that is all we can consider upon this record. Gentry v. U. S., 101 Fed. 51. Mr. Buchhalter flatly denies any such conversation took place. It is not supported by the other testimony or the surrounding circumstances. Buchhalter and Rude, experienced in business affairs, were dealing at arm's length, each seeking to get the most out of the deal.

[fol. 262] The escrow agreement is not disputed and the same had been partly performed. Any oral modification thereof by Buchhalter would have been voluntary and without consideration. The record discloses nothing in the way of an inducement for the same, and it is not in keeping with his previous conduct. We are asked to believe that a business transaction of such importance was made verbally at the bank during the short time that Mr. Rogers was absent. It was not mentioned to him by either party, and the only testimony of his that is in any way pertinent is the following:

"One of them, I don't recall which one, wanted to know if the bonds could remain thereon the escrow until they had arrived at a settlement, which I agreed to do. Both of them were there at my desk when that was said."

The burden of establishing such an oral agreement is upon the party pleading it, and it must be supported by clear and convincing evidence. Shulze v. Shea, 37 Colo. 337; Caldwell & Drake v. Schmulbach, 175 Fed. 429.

A modification of an existing contract amounts to a new agreement, and as long as it remains executory a new consideration is necessary to support it. It must contain all the requisites of a valid and enforceable agreement, and cannot be bottomed on mere indefinite expressions and negotiations.

I am therefore of the opinion that the escrow agreement concerning which there is no dispute—was never modified and is still in force and effect. It follows, therefore, that the bill should be dismissed as to Buchhalter.

The claim of the First National Bank is against Buchhalter's interest only, and is not denied by him. Therefore, they are entitled to a lien as against Buchhalter's interest only.

Blount, Silverstein & Rosner, sued Rude and Buchhalter in the state court and garnisheed the bank. Their rights depend upon the outcome of their suit in the state court.

Findings of fact and conclusions of law in accordance with Equity Rule 70½ may be submitted.

J. Foster Symes, District Judge.

January 30, 1931.

[fols. 263 & 264] In United States District Court

Waiver—Filed June 24, 1931

Comes now the defendant, The First National Bank of Denver, by its attorneys, Hughes & Dorsey and Montgomery Dorsey, and states that it has examined the record on error as heretofore prepared, and hereby waives its rights to alter, amend or supplement said record as prepared.

Dated this 24th day of June, A. D. 1931.

Hughes & Dorsey, Montgomery Dorsey, Attorneys for Defendant The First National Bank of Denver.

6-24-31.

The above and foregoing concurred in by all remaining defts.

By Henry E. Lutz, Their Atty.

Clerk's certificate to opinion omitted in printing.

[fol. 265] In United States Circuit Court of Appeals for the Tenth Circuit

No. 506

Motion to Dismiss—Filed Aug. 6, 1931

Comes now I. Rude, the above named appellee, and moves that the court make and enter an order dismissing the appeal herein.

Brief Statement of Facts

Appellant and appellee had been joint and nearly equal owners of an undivided one-half interest in the properties of the Colorado Pulp and Paper Company, the legal title to said one-half interest standing in the name of appellee Rude. Rude conveyed the one-half interest to appellant Buchhalter and received back a promissory note for $67,500.00, secured by deed of trust on a one-fourth interest. Buchhalter sold the one-half interest to one Binstock for substantially $28,000.00 cash and $92,500.00 in bonds of a new corporation to which Binstock and one Bronstine, owner of the other one-half interest, had transferred the property. To enable the sale to be consummated, Rude surrendered said note and executed a request for release of said deed of trust under an arrangement whereby the entire proceeds of said sale were placed in escrow with The First National Bank of Denver, one of the defendants below. The terms of the escrow were that the bank should hold said funds until Rude and Buchhalter should agree in writing as to the disposition thereof. Rude had consented that Buchhalter might make such sale upon the condition that Rude receive $40,000.00 in cash, or all cash paid by Binstock, and Buchhalter's note for the balance due Rude, payable in six months or a year. Rude had expressly refused to accept any bonds. November 18, 1929, at Buchhalter's request, Rude, a resident of Dallas, Texas, came to Denver to make settlement with Buchhalter. They went to the bank and drew out all of the cash except $100.00,

eleven odd thousand dollars going to the bank to discharge an indebtedness of Buchhalter's secured by his collateral, and Rude receiving the balance.

The bill alleges that at the bank, it was agreed by and between Rude and Buchhalter that, if Rude would allow [fol. 266] Buchhalter to have enough of the cash to discharge said Buchhalter's indebtedness to the bank, Buchhalter would secure a release of said collateral, sell the same on the next day and thus pay Rude in cash the balance due him, and that meantime the bonds should remain in the bank as security for Buchhalter's said promise. The suit was to recover from Buchhalter the balance which Rude claimed, and to enforce and foreclose an equitable lien on said bonds.

Buchhalter and his witnesses testified that the note and trust deed were merely fictitious instruments to delay a threatened partition suit by Bronstine and that the conveyance from Rude to Buchhalter was merely a device to enable Rude and Buchhalter to sell said one-half interest to Bronstine. Buchhalter denied the alleged agreement at the bank and alleged that Rude was in court with unclean hands.

The court entered a decree dismissing the bill with prejudice at Rude's costs, but refused to find that Rude was in court with unclean hands.

In addition to the foregoing and as grounds and reasons for this motion to dismiss the appeal herein, appellee respectfully shows unto the Court the following:

I

It appears from the record herein that the decree of the District Court, from which this appeal has been attempted, grants said appellant (one of the defendants below) all the relief for which he prayed in his answer and all the relief to which he was entitled; said appellant is now seeking affirmative relief, but did not file in said District Court any counter-claim or cross-bill or any paper or pleading in the nature thereof, and has no right of appeal from said decree.

II

There has been no summons and severance or the equivalent thereof. It appears from the record herein that there

were defendants in said District Court other than said Joseph Buchhalter, to-wit: G. Dexter Blount, Harry Silverstein, and David Rosner, co-partners doing business as Blount, Silverstein and Rosner, and the First National Bank of Denver. It further so appears: that the appellee (plaintiff below) and all of said defendants were interested in the funds and bonds involved herein; that said bank is [fol. 267] the escrow holder of said funds and bonds; that said co-partners sued out of the District Court of the City and County of Denver a writ of attachment and caused the same to be executed by garnisheeing said funds and bonds so in the possession of said bank, and by virtue of the premises said co-partnership claims a lien on said funds and bonds as security for an alleged indebtedness due from said Rude and Buchhalter; that by this appeal said appellant Buchhalter seeks to have said decree of the lower court modified and amended so as to award all of said funds and bonds to the said Buchhalter and so as to direct said bank to deliver the same to him to the exclusion, not only of the appellee-plaintiff, Rude, but of the said Buchhalter's said co-defendants upon the alleged ground that the said Rude did not come into court with clean hands, and upon the further alleged ground that the said Rude's said suit filed in the court below was an attempted fraud and imposition upon all of said defendants and the court below, and notwithstanding the fact, admitted by said Buchhalter in his answer and testimony, that said Rude's financial interest in said funds and bonds is substantially equal to or in excess of that of the said Buchhalter; that if any such consequence as that so claimed by said Buchhalter, namely forfeiture of said Rude's interest in said funds and bonds, should follow said Rude's said suit, then in truth and in fact and in law and equity all of said defendants are jointly interested in said forfeiture and are necessary parties appellant herein, and because of the absence of all of said defendants other than the appellant Buchhalter, this Honorable Court has no jurisdiction of the appeal herein.

That said appellant prays in his assignment of errors filed herein that this Honorable Court modify and amend said decree so as to direct said bank to turn over and deliver all of said funds and bonds to said appellant, but that

this Court has no jurisdiction to give any directions to said bank for that said bank is not before this Court or a party to this appeal, and further, as shown in paragraph II hereof, said defendants, Blount, Silverstein and Rosner are indispensable parties and no adjudication can be made disposing of said funds or bonds in their absence. That by reason of the foregoing, said bank and said Blount, Silverstein and Rosner are all indispensable parties herein, but none of them has been made a party to this appeal and said appellant seeks no relief herein which can be granted in the absence of said parties.

[fol. 268] IV

That said appeal is frivolous.

And in support of this motion and as additional reasons therefor, said appellee files herewith his brief.

Ernest Morris, C. E. Wampler, Cass E. Herrington, Cass M. Herrington, Attorneys and Solicitors for Said Appellee.

[File endorsement omitted.]

In United States Circuit Court of Appeals

No. 506

Notice of Hearing on Motion to Dismiss—Filed Aug. 26, 1931

To the appellant above named and to Henry E. Lutz, Esq., his attorney and solicitor:

You will please take notice that at the incoming of court on Monday, September 14, A. D. 1931, at the hour of 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, we will apply to the court to hear and determine motion of appellee to dismiss, a copy of which motion and brief in support thereof is herewith served upon you.

Ernest Morris, C. E. Wampler, Cass E. Herrington, Cass M. Herrington, Attorneys and Solicitors for Appellee.

Received a copy of the above notice together with a copy of motion of appellee to dismiss and brief in support thereof at my office at Denver, Colorado, this 8 day of August, A. D. 1931.

Henry E. Lutz, Attorney and Solicitor for Appellant.

[File endorsement omitted.]

[fol. 269] In United States Circuit Court of Appeals

Order of Submission—Oct. 2, 1931

Before Honorable Orie L. Phillips, Circuit Judge; Honorable George T. McDermott, Circuit Judge, and Honorable John C. Pollock, District Judge

These causes came on to be heard and by agreement of counsel were argued together, Henry E. Lutz, Esquire, appearing for Joseph Buchhalter, Ernest Morris, Esquire, and Cass E. Herrington, Esquire, appearing for I. Rude.

The motion of appellee in cause No. 506, Joseph Buchhalter vs. I. Rude, to dismiss the appeal was argued by counsel.

Thereupon these causes were submitted to the court.

In United States Circuit Court of Appeals

September Term, 1931

No. 506

Mr. Henry E. Lutz for appellant.

Mr. Ernest Morris and Mr. Cass E. Herrington (Mr. C. E. Wampler and Mr. Cass M. Herrington were with them on the brief) for appellee.

September Term, 1931

No. 507

Mr. Ernest Morris and Mr. Cass E. Herrington (Mr. C. E. Wampler and Mr. Cass M. Herrington were with them on the brief), for appellant.

Mr. Henry E. Lutz, for appellee.

Before Phillips and McDermott, Circuit Judges, and Pollock, District Judge

Opinion

McDermott, Circuit Judge, delivered the opinion of the court.

After a foreclosure sale held in June, 1929, the title to the properties of the Colorado Pulp and Paper Company stood in the names of Rude and Bronstine, joint purchasers at the sale. Rude and Buchhalter were associated in the venture, Rude having applied bonds of the par value of $61,000, exclusive of interest, on the bid at the sale, and Buch- [fol. 270] halter having applied bonds and cash to the extent of $53,922. Roughly speaking, Bronstine owned a one-half interest, and Rude and Buchhalter each a one-fourth interest, in the mill. Bronstine was in charge of the operations; Rude and Buchhalter became dissatisfied with his management and wanted to sell their interests to him. Bronstine did not care to buy. In August, 1929, after an acrimonious dispute with Bronstine over the management, Rude and Buchhalter became apprehensive that Bronstine would commence proceedings in partition. They conceived the notion that it would embarrass Bronstine if a fictitious deed of trust was put of record. Their lawyers advised them that nothing could be gained by such a fictitious transaction, as of course was true unless the participants were prepared to follow it up with perjury, and probably not even then. But they persisted in their delusion, and on August 29, 1929, Rude conveyed a one-fourth interest in the mill to Buchhalter for a recited consideration of $75,000. Buchhalter then executed his note to Rude for $67,500, and secured the note by his deed of trust on the one-fourth interest conveyed to him that day. It was conclusively proven that the note and deed of trust were intended to be but scraps of paper as between the parties, and that the sole object of their execution was an unconscionable effort to gain an unfair advantage over Bronstine, their associate in ownership.

Bronstine did not scare; so negotiations were opened to sell their interests to one Binstock. In September, Binstock offered a little cash and a lot of bonds; Rude wanted cash

and not bonds for his share; in any event, he wanted whatever cash there was, offering to give Buchhalter time for the balance. Buchhalter would not agree to this unless Binstock would pay more cash, which Binstock would not do. The deal was left in the air, and Rude went to New York, leaving with his attorney deeds and a release of the trust deed to be used in case of a sale. Buchhalter resumed negotiations with Binstock and agreed on terms in October. Buchhalter testifies he advised Rude of the terms over the phone. It was necessary for Rude to deliver the Buchhalter note of August, and a telegram from his attorney advised him that the deal was closed and asked for the note. Rude sent in the note to the Denver National Bank with instructions to deliver upon receipt of $40,000. These instructions could not be complied with, so Rude modified them by in- [fol. 271] structing the bank to deliver the note to the First National Bank upon a statement from that bank that it would hold the proceeds of the sale to Binstock "until Buchhalter and myself have agreed in writing concerning disposition of said proceeds."

The Binstock deal was closed, and the First National Bank came into possession of the proceeds of the sale, $28,080.56 in cash and $92,500 in bonds. On the afternoon of November 18, 1929, Rude and Buchhalter went to the bank and drew down all of the cash but $100, Rude taking $16,365.34 and Buchhalter $11,615.22. The next day Rude paid $5,000 to the attorneys who had acted for them, so the cash was divided almost equally between them. Block, a disinterested and apparently a fair witness, testifies that on the night of November 18, he assisted Rude and Buchhalter to figure out their respective interests in the bonds in escrow.

So far there is little or no room for dispute as to the facts, and upon these facts Rude and Buchhalter were joint owners of the bonds in escrow, in the proportion that $61,000 bears to $53,922, subject to any accounting as to receipts and disbursements that may be necessary. Rude argues that there was no evidence of any agreement of such joint interest. Their joint interest follows from the facts, and no agreement to that effect is necessary. But here the way divides; Rude swears that while at the bank, on the afternoon of November 18, Buchhalter orally agreed to pay

Rude $75,000, and that the bonds in the bank should be held as collateral to secure the oral promise. Buchhalter stoutly denies any such agreement.

Rude then brought this suit in equity, setting out by way of background, the note and trust deed of August, and an oral agreement alleged to have been made at that time by Buchhalter to pay Rude half of the profit which Buchhalter might realize on a sale, not to exceed $7,500; he sets out that such note and trust deed were cancelled to effectuate the sale. He then alleges and sues on the oral agreement made at the bank in November, the prayer of the bill being for judgment against Buchhalter for breach of the November agreement and for a foreclosure of the lien on the bonds. Buchhalter categorically and under oath denied any such agreement, and set out specifically and repeatedly their joint interest in the bonds; he alleges that Rude comes [fol. 272] into court with unclean hands; he prays that the bill be dismissed "and for such other and further relief as in equity and good conscience the facts warrant." The law firm of Blount, Silverstein & Rosner were made defendants, and answered that they had attached the bonds in a state court for unpaid attorney's fees. The escrow agent, the First National Bank, was made a defendant, and disclaimed any interest except as to a lien for $1,250 on Buchhalter's interest (which we are advised has now been paid), and for costs and attorney's fees. The bank did however pray for "instructions of this court as to the disposition of said cash and bonds."

The court heard evidence at length upon the issue so sharply presented, the existence of the oral agreement sued on, and the cause was submitted. In January, the trial court filed a memorandum opinion, finding the issues of fact against the plaintiff Rude, and directing a dismissal of the bill as to Buchhalter, which was the relief prayed for by Buchhalter. Whereupon defendant Buchhalter filed a request for findings of fact in which he requested that the court find, among other things, that "said Rude, along with said Buchhalter, entered into what may be characterized as a campaign against the said Bronstine;" that a part of this campaign was the execution of the fictitious trust deed in August "in order to impart apparent reality to the trans-

action so far as Bronstine and associates might be concerned." Buchhalter then, for the first time, made the remarkable request that he be decreed to own all the bonds. The trial court denied these requests; made short and concise findings of his own and dismissed the bill. But Rude and Buchhalter appeal.

Rude's appeal may be quickly disposed of. His entire case is predicated upon an oral agreement, the evidence concerning which is in sharp conflict. Rude's testimony cannot be buttressed by the fictitious note and trust deed of August, for nothing can be predicated upon such an evil-smelling transaction. That he insisted on a large amount of cash in the early stages of the Binstock deal is a circumstance only, the force of which is dissipated by the fact that he later yielded and surrendered his note without any cash requirements. Rude's story of the oral agreement is inherently improbable, and is in conflict with many circumstances, not the least of which is the fact that he consented that Buchhalter draw down $11,615.22 in cash immediately [fol. 273] after the oral agreement that Rude was to get all cash was alleged to have been made, and that he and Buchhalter and Block spent the same night figuring out their respective interests in the bonds. The trial court did not believe Rude's story; we do not believe it; and that ends his appeal.

Buchhalter's appeal stands in somewhat different stead. Buchhalter's answer set out the joint interest of the parties in the escrow; the evidence supported his allegations. But he did not pray for any affirmative relief. The decree gave Buchhalter the relief he asked for at the trial—a dismissal of plaintiff's bill. After the decision of the trial court he asked for additional relief, but relief to which he was not entitled. In this court, Buchhalter's position is that he is entitled to all of the bonds, a remarkable request considering that his sworn answer, his testimony, and the undoubted facts disclose that he does not own all the bonds and never did. As we understand his claim, it is based upon two propositions. First, that Rude and he engaged in an unconscionable campaign against Bronstine; that Rude's hands are therefore unclean, and that by virtue thereof title to the bonds has passed to Buchhalter. The doctrine of unclean hands is a weapon of defense—it is not a muniment of title. And even if it were otherwise, a court of

equity would hardly pass title from one unclean pair of hands to another pair which was particeps criminis. His second point is that by electing to claim a lien on all the bonds, Rude has abandoned claim of ownership to any. This discloses a confusion as to the doctrine of election of remedies. Where causes of action are predicated upon different states of fact, there is no election of remedies. The doctrine of election of remedies comes into play only when there are two or more inconsistent remedies available on the same facts. If the oral contract alleged by Rude had been made, he had a lien; if it was not made, he was a joint owner of the bonds. There is no rule of law that imposes a forfeiture of a half interest which a litigant actually has, because of his failure to establish his right to all, or that compels him correctly to forecast the outcome of an issue of fact under pain of forfeiting all interest in the subject matter. The Supreme Court of the United States decided the precise question here involved in Bierce v. Hutchins, 205 U. S. 340, 347, where Mr. Justice Holmes said:

[fol. 274] "But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. Northern Assurance Co. vs. Grand View Building Assoc'n, 203 U. S. 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt."

In Barnsdall v. Waltemeyer (C. C. A. 8), 142 F. 415, a plaintiff brought a suit to rescind a contract for fraud; he failed to prove the fraud; then he brought a suit on the contract, and was met by the plea that he had elected to treat the contract as rescinded for fraud and could not thereafter come into court on the theory that there was no fraud. Judge Walter H. Sanborn denied the plea and in forcible language answered the contention here made. He said:

"It is contended that by the institution and prosecution of this suit in equity the plaintiff irrevocably elected to

rescind the contract, and thereby estopped himself from maintaining this action to enforce it. But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake."

Judge Learned Hand disposed of a similar contention in apt language, when he said: "A party has an election only between existing, not supposed, rights. * * * That would put him, not to an election, but to a correct estimate of his right under pain of forfeiture." Doyle v. Hamilton Fish Corp. (C. C. A. 2), 234 F. 47.

It is entirely clear that neither appellant is entitled to what he asks for by his appeal. The only decree that can ever be rendered is one predicated upon the truth, and that is, that they jointly own these bonds. There is much to be said for the trial court's decision to grant no relief in the premises, for there is a natural reluctance in granting relief to either. But the fact remains that the bonds are in the [fol. 275] possession of the bank and that the parties cannot agree as to their disposition. Some court must instruct the escrow agent as to their disposition. There is no real reason why this court should pass on this unpleasant duty to another court, and thereby put the public to the expense of another trial. The facts are before us, and we have concluded that this court of equity, having taken hold of the matter, should wind it up.

The fact is that Rude and Buchhalter own these securities jointly, in the proportion that $61,000 bears to $53,922, subject to any claim thereto that may be established in the state court by Blount, Silverstein & Rosner, and subject to any unadjusted items of account between the two. If this were the ordinary case of a claim being honestly but mistakenly asserted, such a decree should be entered, Rude paying the costs of the case. But we are convinced that Rude's claim was not put forth in good faith, and that his testimony is materially false. Equity abhors a forfeiture, and unconscionable as Rude's conduct is, we are not at liberty to forfeit his property, particularly to one whose conduct is not irreproachable. But equity should right the wrong done, as far as may be. Rude has put Buchhalter and the bank to the expense of defending a claim conceived

in bad faith. Any decree should therefore be so conditioned as to impress upon Rude's share of the securities a lien in favor of Buchhalter and the bank for the expenses to which they have been put by the assertion of this groundless claim, the amount thereof to be determined by the trial court.

The case will therefore be remanded with instructions to enter a final decree, taxing the court costs in the District Court against Rude; whatever may be left of the securities after the claim of Blount, Silverstein & Rosner has been adjudicated and satisfied in the state court, should be subject first to the proper charges of the escrow agent as such; second, the balance should be apportioned between Rude and Buchhalter in the proportion that $61,000 bears to $52,922, subject to any items of accounting that may be established between the two; third, from Rude's share, as so determined, should be deducted the court costs and the expense to which Buchhalter and the bank have been put in this litigation, including reasonable attorney's fees, to be determined by the trial court. The trial court is authorized to sell the securities, if necessary to carry out its decree, [fol. 276] subject to the prior right of the state court. The cost of printing the record on these appeals is taxed to Rude; the other costs in this court are taxed to the appellant in each case.

Remanded with instructions.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 506

DECREE—December 17, 1931

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that this cause be and the

same is hereby remanded to the said District Court with instructions to enter a final decree:

That the costs in said court be taxed against I. Rude; that the balance of the securities in controversy in escrow in The First National Bank of Denver, Colorado, after the claim of Blount, Silverstein & Rosner has been adjudicated and satisfied in the state court, be first subjected to the proper charges of the escrow agent as such, and that the balance then remaining of said securities be apportioned between I. Rude and Joseph Buchhalter in the proportion that $61,000 bears to $53,922, subject to any items of accounting that may be established between them; and that from the share of I. Rude as so determined be deducted the trial court costs and the expenses to which Joseph Buchhalter and The First National Bank of Denver, Colorado, have been put in this litigation, including reasonable attorney's fees to be determined by the trial court

It is further ordered, adjudged and decreed by this court that the said district court be and it is hereby authorized to sell the said securities, if necessary to carry out its decree, subject to the prior right of the state court.

It is further ordered, adjudged and decreed by this court that the cost of the printing of the record in this cause be [fols. 277 & 278] and the same is hereby taxed to I. Rude, appellee, and that all other costs in this court be and the same are hereby taxed to Joseph Buchhalter, appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 507

DECREE—December 17, 1931

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be and the same is hereby

affirmed; and that Joseph Buchhalter, The First National Bank of Denver, a banking corporation; G. Dexter Blount, Harry Silverstein and David Rosner, copartners doing business as Blount, Silverstein and Rosner, appellees, have and recover of and from I. Rude, appellant, their costs herein.

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[fol. 281] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 506

JOSEPH BUCHHALTER, Appellant,

v.

I. RUDE, Appellee

No. 507

I. RUDE, Appellant,

v.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, a Banking Corporation; G. Dexter Blount, Harry S. Silverstein, and David Rosner, Copartners, Doing Business as Blount, Silverstein and Rosner, Appellees

Appeals from the District Court of the United States for the District of Colorado

PETITION OF I. RUDE FOR REHEARING—Filed Jan. 15, 1932

Comes now I. Rude, appellee in cause No. 506, and appellant in cause No. 507, by his attorneys and solicitors and respectfully petitions and prays:

[fol. 282] 1. That the Opinion filed herein be withdrawn and the Decree herein be vacated and this petitioner, I. Rude, be granted a rehearing.

2. That if the Opinion herein is not withdrawn, the Court modify the same by striking out those portions thereof wherein it is stated that Rude's claim was not put forth in good faith, that his conduct was unconscionable, and that his testimony is materially false.

3. That if the Opinion herein is not withdrawn, the Court modify the same by striking out those portions thereof which provide that Rude's share of the escrow be impressed with a lien in favor of Buchhalter and the Bank for their expenses and attorneys' fees.

4. That if the Decree herein be not vacated, this Court modify the same by striking therefrom all of those portions thereof which provide that the trial court shall determine the expense, including reasonable attorneys' fees, to which Buchhalter and the Bank have been put in this litigation, and that the amount of such expense and attorneys' fees shall be deducted from Rude's share of the escrow securities.

I.

As grounds for this petition and as will be more particularly shown hereinafter, the said I. Rude respectfully shows unto this Honorable Court the following:

1. The Court inadvertently overlooked and misapprehended certain material facts and circumstances in holding:

(a) That Rude's suit was not brought in good faith.

(b) That his testimony was materially false.

(c) That he should pay the expenses and attorneys' fees to which Buch-alter was put in this litigation.

(d) That he should pay the expenses and attorney's fees of the First National Bank.

2. The general rule is that only the usual taxable costs can be assessed against a litigant. To this rule there are a few exceptions, but this case does not fall within any thereof.

[fol. 283] 3. Buchhalter never asked for any expenses or attorneys' fees either in the court below or here. Rude has never had any hearing as to such matters. To condemn Rude to pay such expenses and attorneys' fees without such hearing is to deprive him of his property without due process of law, contrary to Amendment V of the Constitution of the United States.

4. While under some circumstances the Bank, being a trustee, might be entitled to its expenses and attorneys' fees, yet since the District Court rejected the tenderd findings of fact and conclusions of law wherein attorneys' fees were asked, and the Bank did not appeal, it is res judicata herein that the Bank is entitled to nothing except the usual taxable costs.

I

Rude's Good Faith

It is enjoined upon us that "the lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. * * * His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination". (Canon 30, Professional Ethics of the American Bar Association.)

To determine whether or not a claim is sufficiently well founded to justify a lawyer in advocating it, is one of the most difficult things in the practice. All lawyers have lost cases which seemed certain of success and won others which had appeared so doubtful as to give serious question to the propriety of entering them. Some of the present counsel for Rude did not enter this case until it reached this Court, and all of us came in after the issues were made up and after plaintiff had rested his case. The trial court expressly twice refused to find Rude guilty of bad faith or false swearing which we think amounts to an affirmative finding that he was not so guilty. This Court on the same record and without seeing the witnesses has concluded that the suit was brought in bad faith and has branded Rude as one unworthy of belief. We are confident this Court would [fol. 284] not want to do that unless convinced beyond a reasonable doubt, nor unless a proper determination of the controversy requires it. It is respectfully urged that the Court inadvertently overlooked or misapprehended the following matters which show that Rude had good reasons honestly to believe that just grounds existed for the suit:

1. While the trial court was of the opinion that the contract sued on was not sufficiently definite and certain to amount to an enforceable agreement, nevertheless, he evidently believed that such negotiations were had and such expressions used that Rude was justified in believing that he had such an agreement. Speaking of the alleged contract the District Court said in its Memorandum: "It must contain all the requisites of a valid and enforceable agreement, and cannot be bottomed on mere indefinite expressions and negotiations." (Record, p. 263.) If there had not been, in

the trial court's opinion, "expressions and negotiations," at least, along the line of the agreement alleged, there would have been no occasion for the use of such terms in the Memorandum.

2. There are many uncontroverted facts and surrounding circumstances which support the agreement alleged in the bill:

(a) Rude's consent that Buchhalter might sell to Binstock was subject to the condition that Rude should receive all cash paid by Binstock and should not be required to take any bonds. This was testified to by Buchhalter's own witness, Block, whom this Court designated as "a disinterested and apparently a fair witness" (Record, pp. 114-116, 120-122). When Buchhalter concluded the contract of sale with Binstock, Buchhalter thereby accepted Rude's condition and became bound to give Rude at least all of such cash. This is not merely our conclusion. Block undoubtedly understood that he was concluding a deal which would give Rude cash (Record, p. 122). That contract and consequent obligation upon Buchhalter to give Rude this cash were entered into October 10th, 1929. There is no evidence or claimed evidence that Rude ever modified this con-[fol. 285] dition, or authorized Buchhalter to sell to Binstock or anybody else except upon the distinct understanding that Rude was to have this cash and be required to take no bonds. We except Buchhalter's version of the telephone conversation between him and Rude on October 16th, six days after Buchhalter had concluded the Binstock contract of sale.

(b) October 16th, before the alleged telephone conversation of that night, Buchhalter telegraphed Rude that "about thirty-eight thousand" dollars were to be paid by Binstock in cash (Exhibit J, Record, p. 221), thus leading Rude to believe that Binstock had agreed to pay the additional $10,000.00 which Buchhalter had told Block he must get if he had to pay Rude cash. But Buchhalter's obligation to pay Rude cash was not contingent on Binstock's paying the additional $10,000. Buchhalter was authorized by Rude to sell to Binstock without any additional cash, but if he did sell upon any terms, his obligation at once arose to give Rude whatever cash Binstock paid, whether it was $28,000.00 or $38,000.00, or any other sum

less than Rude's entire share, because that was the condition attached to Buchhalter's authority to sell.

(c) Without any modification of that condition, Rude and Buchhalter approached the Bank with Buchhalter already bound to give Rude the cash.

Clearly there was no such modification unless we are to believe Buchhalter's version of the telephone conversation. This alleged conversation is considered on pages 76 and 77 of our brief in cause No. 507. Inadvertently this Court must have overlooked or misapprehended what is said there. The Court apparently accepts Buchhalter's statement concerning this conversation, for, in the course of the opinion, it is said, "Buchhalter testifies he advised Rude of the terms over the phone." Buchhalter's exact testimony was "I told him that that was the very best deal that we could make * * *" (Record, p. 136). We respectfully suggest that the conclusion in the above quoted portion of the opinion is hardly justified by Buchhalter's testimony. And we feel that the Court will not want to accept Buchhalter's version of this matter and at the same time overlook the error in excluding Rude's offered testimony on the subject (Assignments XXXVII and XXXVIII, pp. 248-249).

[fol. 286] 3. Binstock would have testified, if permitted, in further corroboration of Rude's contention that he was to have cash out of the transaction. Plaintiff offered to show, among other things, by Binstock that Buchhalter told Binstock "he had to pay Rude at least $40,000.00 cash in the deal" (Record, pp. 174-175; Assignment XXXIV, p. 248). This matter was discussed on pages 61-62 of our brief in cause No. 507. As we said in the briefs, the principal issue at the trial was as to whether Rude was entitled to cash or whether he was obliged to accept bonds. The chief thing now under discussion is Rude's good faith. We felt that we had conclusively demonstrated on pp. 30-41 of our brief in case No. 507 that an agreement did exist whereby Rude was to have cash and not bonds. While the Court has now decided that there is not sufficient proof to permit recovery under the agreement to pay cash, we trust we may again most earnestly press upon the Court's attention the fact that there was some agreement that Rude was to have cash. As we view the evidence in the light of

the opinions of this and the trial court, the weakness in Rude's case which perhaps defeated him was not that no agreement was shown, but that the agreement in suit to pay cash was, under the evidence as finally developed, too indefinite as to amount, time and terms of payment to permit of specific performance. As we said in our original brief, the agreement sued on was a modification of a previously existing agreement to pay cash. Suit was not on the original agreement, which arose when Buchhalter sold to Binstock, but on a subsequent agreement at the bank. And the trial court's memorandum shows that he was of the opinion that some such agreement existed but he was not satisfied with the proof of the one alleged. He said (Record, p. 261): "this alleged oral agreement testified to by Rude is the crux of the controversy, and what he really seeks in this suit is damages for a breach thereof, and that is all we can consider upon this record" (Citing Gentry v. U. S., 101 Fed. 51, which holds that one may not declare on one theory and recover on another, no matter how strongly the evidence may support some other theory). Further on in its Memorandum the District Court said:

[fol. 287] "The burden of establishing such an oral agreement is upon the party pleading it, and it must be supported by clear and convincing evidence. Shulze v. Shea, 37 Colo. 337; Caldwell & Drake v. Schmulbach, 175 Fed. 429.

"A modification of an existing contract amounts to a new agreement and as long as it remains executory a new consideration is necessary to support it. It must contain all the requisites of a valid and enforceable agreement, and cannot be bottomed on mere indefinite expressions and negotiations." (Record, p. 262.)

We felt at the time, and still think, that the District Court's decree of dismissal would have left Rude free to sue on the original agreement to pay cash, and that, under the evidence in this case, he would have been fairly certain of success. Doubtless, counsel for Buchhalter was of the same opinion and perhaps that was the reason for Buchhalter's precipitate haste in appealing to this Court. He performed the immense amount of labor incident to such appeal in six days after the decree (Record, pp. 45, 47, 48).

Thus it seems clear to us that the fact that there did exist some agreement to pay cash (however indefinite the Court may believe it to have been), is conclusive of Rude's good faith.

4. In the course of the Opinion the Court comments upon the fact that "the cash was divided *almost* equally between them." (Italics ours.) We respectfully suggest that the Court inadvertently overlooked the significance of the fact that the cash was not divided either in exactly equal portions or according to the amounts of their respective investments. Rude's investment was greater than Buchhalter's. The $5,000.00 of Rude's which was applied on attorneys' fees the next day, left Rude with less than half the cash. Had the intention been to divide the cash equally or as their interests appeared, they would have done so while at the bank at the time they drew the money. The fact that Buchhalter received only the exact amount of his indebtedness to the bank is a circumstance more strongly in support of Rude's contention than is the coincidence that [fol. 288] Rude's subsequent advancement of $5,000.00, left the cash divided somewhere nearly equally, in support of Buchhalter's claim.

5. In the Opinion, it is said: "That he (Rude) insisted on a large amount of cash in the early stages of the Binstock deal is a circumstance only, the force of which is dissipated by the fact that he later yielded and surrendered his note without any cash requirements." In so construing the evidence, the Court, we respectfully suggest, misapprehended the surrounding circumstances.

(a) The trust deed which on its face at least, secured the $67,500.00 note, was of record (Record, p. 201). This trust deed runs to the Public Trustee of Adams County. It is the practice of the public trustees to require surrender of notes secured by trust deeds as a condition precedent to the release thereof.

(b) Rude had the note. Binstock could not be expected to complete the deal and pay in the purchase price until the trust deed was released or he was placed in a position where he could get it. It was, therefore, necessary for Rude to arrange in some way that the note should be available to Binstock upon payment of the purchase price.

(c) October 12, Mr. Silverstein telegraphed Rude as follows:

"Buchhalter Binstock Contract Signed All Papers Delivered to Buchhalter and Placed in Escrow Must Have Note Here To Accompany Your Request Release Trust Deed Not Later Than Wednesday Next Week to Complete Deposit In Escrow Wire Answer." (Exhibit F, p. 209.)

Mr. Silverstein was Rude's attorney in this matter as well as Buchhalter's.

(d) Upon receipt of this telegram Rude telegraphed Buchhalter:

"Advise Silverstein note mailed care Denver National Bank wrote you." (Exhibit H, October 14, Record, p. 216.)

[fol. 289] (e) At the same time, October 14, Rude did send the note to the Denver National Bank accompanied by a letter (Exhibit I-9, Record, p. 220) directing that Silverstein be notified of the note's receipt and stating among other things:

"Whatever cash the purchasers is paying on the purchase price, I am to receive up to the amount of the note, but not less than $40,000.00. The balance, if any, I am to take a note secured by Mr. Buchhalter, for a period not exceeding one year.

"If the note is to be deposited in escrow with the other papers, you may do so with the understanding that the above conditions are to be carried out before surrender of the note."

(f) When the note and letter were received by the Denver National Bank, Buchhalter was advised, and on October 16, he telegraphed Rude as follows:

"Received letter Denver National stop Binstock depositing nineteen thousand dollars now stop Balance up to about thirty eight thousand together with bonds after incorporation of Company and taking of inventory which will be November 1 stop all Silverstein can give bank now is receipt for note and statement that proceeds both cash and bonds will remain in present escrow subject to your order and

will not be drawn down unless approved by you stop wire bank to turn over note upon receipt" (Exhibit J, p. 221).

(g) Thereupon, Rude telegraphed the Denver National Bank thus:

"Supplementing my letter with the Buchhalter note now in your possession I herewith authorize your bank to deliver same to First National Bank escrow holder of paper mill sale agreement you getting receipt stating that the purchase price of about thirty eight thousand dollars cash and all bonds delivered by purchaser be held until Mr. Buchhalter and myself have agreed on release in writing" (October 17, Exhibit I-7, Record, p. 219).

[fol. 290] (h) On the same day the Denver National Bank answered by wire to Rude:

"Before delivering note enclosed your letter October fourteenth to escrow holder, we must have your instructions as follows stop I hereby authorize you to deliver Buchhalter note dated August twenty ninth nineteen twenty nine for sixty seven thousand five hundred dollars to The First National Bank of Denver Colorado as escrow holder under terms any escrow instructions made executed and delivered pursuant to any contract of sale between Joseph Buchhalter and M. Binstock covering sale Buchhalter interest in property described in trust deed securing said note upon your taking receipt from escrow holder stating it will hold any and all proceeds deposited with it under said contract or said escrow instructions until Buchhalter and myself have agreed in writing concerning disposition of said proceeds" (Exhibit I-8, Record, p. 220).

(i) And Rude finally gave the Bank the requested instructions.

We respectfully invite attention to the fact that the foregoing does not amount to any waiver or surrender of Rude's right to cash. The most that could be claimed would be that Rude waived his right to a $40,000.00 minimum in cash and agreed to take whatever cash Binstock should actually pay in. In this exchange of letters and telegrams there is no intimation that Buchhalter denies Rude's right to the cash. Rude is merely persuaded to postpone his claim and

to consent that the money shall be placed in escrow from which it cannot be withdrawn without his consent. Starting with Rude's right to "whatever cash comes in on the deal", which right we think was conclusively shown, we cannot see how a consent to the escrow can be construed to be any change in what Rude was ultimately to receive. This is fortified by the fact that the escrow is entirely silent as to how the proceeds were to be distributed between Rude and Buchhalter.

(j) In the Opinion, it is said that "the fact that he [fol. 291] (Rude) consented that Buchhalter draw down $11,615.22 in cash immediately after the oral agreement that Rude was to get all cash was alleged to have been made" is a circumstance in conflict with Rude's story of the oral agreement. We respectfully submit that in so stating, the Court misapprehended the allegations of the Bill and the evidence. The consent that Buchhalter might receive $11,615.22 was not given "immediately after the oral agreement" but was part and parcel of it (Record, pp. 3, 4, 67-69). We have tried to make plain, and trust that we have succeeded, that Buchhalter's original agreement that Rude should have cash arose on October 10, 1929, when Buchhalter sold to Binstock; that agreement was that Buchhalter would give Rude all the cash paid in by Binstock and make up the balance to which Rude was entitled with Buchhalter's note due in six months or a year; the oral agreement sued on was a modification to the effect that Rude should have no note but that, if Rude would allow Buchhalter temporarily to have enough of the cash paid in to discharge his indebtedness to the Bank, Buchhalter would thereby secure a release of his collateral, would sell the same and pay Rude all cash instead of part in cash and part in Buchhalter's note.

Surely, there was ample evidence—taken as a whole, surrounding circumstances and all—to justify a belief on Rude's part and an opinion by his counsel that the case was "one proper for judicial determination".

The Finding That Rude's Testimony is Materially False

We respectfully show unto the Court that the foregoing finding is not necessary to the decree herein and feel that

the Court would not want such finding to stand, particularly if apprised of the possible use to which the Court's language may be put. A court of equity is not a court of punishment and, therefore, we are certain that this Court intended by its Opinion merely to do justice between the parties and not to inflict any unnecessary punishment upon Rude. Does justice to Buchhalter require that he and the other defendants be armed with the statement of the highest Court in this Circuit that it does not believe Rude and that his testimony in this case is false?

[fol. 292] The circumstances are so unusual that we feel this Court should be, and would want to be, advised of certain matters which have not been brought to its attention, as follows:

(a) Mr. Rude has been regarded as one of our most public spirited citizens and benefactors. Among other things, there are a public park and at least one charitable building in Denver, which were given his name in honor of his distinguished services to the community. He maintains a Chair of Biblical Literature in the University of Denver, known as The J. Rude Endowment.

(b) Already the Opinion of this Court has been twice used by Mr. Rude's opponents, not because of any of the points of law which are laid down, but as indicative, so it is claimed, of his general disposition to engage in unfounded litigation and to support the same with testimony which is untrue. The record herein discloses that there is pending an action by the defendants Blount, Silverstein & Rosner against Rude and Buchhalter for attorneys' fees. Only last week—January 8, 1932—counsel for Blount, Silverstein & Rosner (who is the same as Buchhalter's counsel here) filed in the Supreme Court of the State of Colorado a brief in said attorneys' fees case wherein attention is called to the Opinion of this Court. It is then said in that brief:

"It may be well also at this juncture to inform this Honorable Court of what is now a matter of public record—public insofar as any matter can be that appears in the decision of an appellate court—that Mr. Rude was there held to be an 'unconscionable' litigant, and while the Court of Appeals did not feel at liberty to forfeit his entire interests there in controversy, they saw fit, none the less, to

visit upon him a *castigation forever destructive of his integrity or of any pretended truth or veracity.*" (Italics ours.)

The said brief then quotes the language of this Court, which we have herein requested be deleted, and then proceeds to inform said Supreme Court that it is the same Mr. Rude to whom your Honors referred!

[fol. 293] On or about the same day, January 8, 1932, in an action on trial to a jury in the District Court of the City and County of Denver, between Rude and Buchhalter, Mr. Rude was asked on cross-examination by one of the said attorneys if it was not true that this Court had used said language concerning him!

Of course, this Court did not contemplate, when preparing its Opinion, that such improper use of its language would be made. But the foregoing shows how far reaching an opinion of an appellate court may be, although that court intends only to decide matters necessary to a proper determination of the specific controversy before it. In law, one's reputation for truth and veracity may not be assailed by proof of specific instances of alleged misconduct. (1 Wigmore on Evidence, 2d ed., Secs. 66 and 209.) But this Court speaks with authority and more particularly for that reason will not want to make possible a repetition of such use of its present language.

If the finding that Rude's testimony was materially false was made as a basis of the decree condemning him to pay such expenses and attorneys' fees, then we respectfully urge that this Honorable Court has inadvertently tried, convicted and punished him as for perjury in violation of the rule laid down in ex parte Hudgings, 249 U. S. 378, 63 L. Ed. 377.

Under the rule laid down in that case, even the trial court could not have punished Rude merely because it might have believed him guilty of false swearing. A fortiori this Court has no power to do so because the alleged perjury was not committed in its presence.

We have great confidence that, in the succeeding sections hereof, we will convince the Court that it erred in awarding expenses and attorneys' fees to Buchhalter and the Bank. If we succeed there will then be no objection, we apprehend, to the deletion of the language derogatory to Mr. Rude,

because, as we understand it, the only object of such findings is to form the inducement for an award of expenses and attorneys' fees. But we must respectfully urge that, even if the bringing of vexatious litigation were a sufficient basis for a decree for expenses and attorneys' fees, for the [fol. 294] purposes of the decision it would suffice merely to find that the litigation was vexatious and without probable cause. Need the Court go further and convict him of bad faith, false swearing and unconscionable conduct, when the lower court who saw and heard the evidence refused to do so?

II

The Decree That Rude Pay Expenses and Counsel Fees

No lawyer can ever be certain that he has found all the law on any subject. Nevertheless, we have examined the law on this matter with such painstaking care that we feel justified in representing to the Court that its Decree requiring Rude to pay the expenses and attorneys' fees of Buchhalter is without precedent in American jurisprudence.

1. We have asked for a *re*hearing on this question. We respectfully direct attention to the fact that we have never had any hearing thereon at all. Buchhalter never claimed expenses or attorneys' fees either in the trial Court or here. The first mention of the subject in this litigation is in this Court's Opinion. Of course, ordinary taxable court costs are a usual incident of the judgment, although it has long been the practice of courts of equity to grant or withhold such costs, in their discretion. To award one litigant his attorneys' fees and other expenses under the circumstances of this case has never been done either with or without a hearing on the subject. We respectfully submit that to do so without a hearing is to deprive Rude of his property without due process of law in violation of Amendment V of the Constitution of the United States. (Hovey v. Elliott, 167 U. S. 409; 42 L. Ed. 215.) For that reason alone, we think the Petition for Rehearing should be granted, or the Opinion modified.

In the Hovey case, supra, the Supreme Court reaffirmed its opinion in Reynolds v. Stockton, 140 U. S. 254, 35 L. Ed. 464. In the Reynolds case the Court said that a judgment

is not valid when it is "not responsive to the issues presented," and quoted with express approval the following language in the case of Munday v. Vail, 34 N. J. L. 418:

[fol. 295] "Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

When parties enter upon or determine to continue litigation, it should be possible for them to know all that the court could possibly adjudge against them. The pleadings of their adversaries are intended to give litigants this information and are the measure of the court's power. There is nothing in the pleadings, nor in the briefs, nor anywhere else in the case, which could possibly have given either Rude or his counsel any intimation that expenses or attorneys' fees might be recovered from him. The one thing which Buchhalter claimed in the court below and here was that the suit was on the note and that it was a fictitious instrument. Both this Court and the trial court have held that the suit was not on the note, as of course it couldn't have been. The only relief which Buchhalter asked was: in the court below, dismissal, as this Court says in its Opinion; in this Court, Rude's bonds, which this Court has held he may not have. The only matters litigated in the district court were, on the one hand whether Rude was entitled to cash and a lien; on the other whether Buchhalter was entitled to a dismissal. The only matters presented to this Court were: (1) should Buchhalter have Rude's bonds; (2) should Rude have cash; (3) if the answer to both of the foregoing questions should be no, should the escrow be decreed to be divided in proportion to the respective investments of the parties?

Under these circumstances we respectfully and most earnestly contend that this Honorable Court is without jurisdiction or power to award either expenses or attorneys' fees.

2. As we understand the Opinion, the Court finds that there was not probable cause for institution of the suit and for that reason it is thought proper to charge Rude with the expenses, including attorneys' fees, of Buchhalter and the Bank. We have tried to convince the Court that it erred

in finding that Rude did not proceed in good faith and that his testimony was materially false. If we have succeeded, [fol. 296] the provision for the payment of these expenses automatically falls. But even if the Court should feel impelled to adhere to its Opinion as to Rude's good faith, that, we submit, is not a sufficient predicate upon which to base a decree for expenses and attorneys' fees.

The "fee bill" statute (U. S. C. A. title 28, Secs. 571-572) provides:

"Section 571. Fees to be Taxed.—The following fees *and no other shall be taxed and allowed to attorneys, solicitors,* and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

"Section 572. Attorneys, solicitors, and proctors, * * * on a final hearing in equity * * *, a docket fee of $20.00."

While it is sometimes loosely stated that those sections do not bind courts of equity, such courts have not gone beyond the statute in awarding attorneys' fees except in seven classes of cases (none of which embraces the case at bar), namely:

(1) Where there is a statute authorizing the allowance of attorneys' fees.

(2) Where there is a rule of court.

(3) Where there is a contract.

(4) Where one party has brought a fund into court in which others are allowed to share.

(5) Where a trustee is put to expense concerning the trust.

(6) Where a receiver has been improperly appointed.

[fol. 297] (7) In that class of cases where it has been the established practice in equity to allow such fees.

The seventh class is broad enough to include all the others.

The leading case on the subject, often quoted and followed, is Oelrichs v. Williams, 15 Wall, 211; 21 L. Ed. 43. That was a suit in equity wherein the Supreme Court said:

"In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, *however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected.* The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the Court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." (Italics ours, except the Latin phrase.)

In an earlier case, Arcambel v. Wiseman, 3 U. S. 306; 1 L. Ed. 613, the lower Court in its decree allowed "a charge of 1600 dollars for counsel's fees". The Supreme Court said of this:

"We do not think that this charge ought to be allowed. The general practice of the *United States* is in opposition to it; and even if that practice were not strictly correct in [fol. 298] principle, it is entitled to the respect of the Court, till it is changed, or modified, by statute."

In Hauenstein v. Lynham, 100 U. S. 483, 491; 25 L. Ed. 628, 631, the Court said:

"It is a settled rule in this Court never to allow counsel on either side to be paid out of the fund in dispute."

Prior to adoption of the "fee bill" statute, it had been the practice to allow counsel fees in certain cases in admiralty. But since that statute the Supreme Court has held that the Court has no power to award counsel fees beyond those prescribed in that Act of Congress. The Baltimore v. Rowland, 75 U. S. 377; 19 L. Ed. 463, 467. In that case the Court said:

"Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.

"Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L., 161."

In Motion Picture Patents Co. v. Steiner, 201 Fed. 63, 64, it was held that a court of equity has no power "to award an additional allowance to the prevailing party who has been put to 'considerable annoyance and expense' by reason of the prolonged examination of witnesses by his adversary's counsel".

The only case we have been able to find which contains any language which could possibly be construed to permit the taxation of costs as between solicitor and client, in a [fol. 299] case of this character, is Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 Fed. (2d) 233 (8th Cir.). That case was one where a trustee was awarded expenses and attorney's fees in litigation concerning the trust and hence came under the 5th exception above mentioned. And the Decree of the Circuit Court of Appeals was reversed by the Supreme Court in Kansas City Southern Ry. Co. v. Guardian Trust Co., 281 U. S. 1; 74 L. Ed. 659. It is true that the Supreme Court did not pass upon the power

of a court of equity to award such costs, saying: "Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs and to make such allowance should be clearly expressed in the Decree." The original Decree of the District Court in that case made no provision for the taxation of such costs. That Decree as affirmed required the "taxation of costs * * * under the principles, rules and practice in equity". Under the mandate it was claimed in the District Court that the above quoted language gave authority to tax costs as between solicitor and client, provided that such could be done "under the principles, rules and practice in equity". The District Court disallowed the application for such taxation, the Circuit Court of Appeals reversed the decree and allowed such costs and the Supreme Court reversed the Decree of the Circuit Court of Appeals and affirmed that of the District Court. Hence, the only thing determined in that case was that the "taxation of costs * * * under the principles, rules and practice in equity" does not permit the allowance of costs as between solicitor and client. In other words the term "costs" is not broad enough to permit the awarding of expenses and attorneys' fees as incident to the judgment. Judge Van Valkenburgh was then the district judge and he held as follows:

" 'The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law:

" 'First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main [fol. 300] ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not sustained, but found to be baseless and unwarrantable.

" 'Second. Where a fiduciary relation exists between the parties, such as trustee and cestui que trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded

suit brought against him by such cestui que trust, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable' " (28 Fed. (2d) 234).

In other words, lack of good faith in bringing the action is not enough. The case must be one where the plaintiff therein has made, but failed to sustain, gross charge of fraud and misconduct. There was no such charge against Buchhalter. In the Supreme Court counsel for the Guardian Trust Company filed a brief in which they sought to sustain the decree of the Circuit Court of Appeals. In that brief, which appears as a part of the case as reported, it is claimed that the practice in this country is to impose costs as between solicitor and client as indemnification for "litigation which is wholly baseless and unwarranted." A long list of cases is cited in alleged support of that proposition. We have examined them all with care and not a single one supports it. There simply is no authority in this country for awarding such costs merely because the Court finds that the suit is not brought in good faith.

3. Expenses and Attorneys' Fees Awarded the Bank

Albeit, the amount of such fees and expenses must of necessity be small, we respectfully submit that the Court erred in awarding them in this case. Perhaps the trial court would have been authorized to do so because, as stated above, the bank, being a trustee, falls within one of the exceptions which permits the allowance of such expenses. But the District Court did not do so, refused the tendered findings which provided for $250.00 on behalf of [fol. 301] the bank (Record, p. 43), and, therefore, it is res judicata in this case that no such expenses can be recovered by the bank because it did not appeal. The bank never made any appearance in this Court. In other words, it was satisfied with the decree below.

It seems to us that Buchhalter also is precluded on this point for the same reason. Those tendered findings of fact were prepared and tendered by Buchhalter. While he asked for attorneys' fees in behalf of the bank, he never claimed any in behalf of himself. He has claimed none here.

In addition to tendering said findings, Buchhalter filed below his Motion to Amend Final Decree wherein no mention of expenses or attorneys' fees is made. The one thing he sought (aside from dismissal) in the District Court and here was Rude's bonds.

One other minor matter ought to be mentioned at this point, namely, the provision taxing the cost of printing the Record to Rude. As shown above, Buchhalter hastened to appeal from a decree which gave him all he asked until after it was rendered. There is nothing in the District Court's decree—or out of it—of which Buchhalter had any right to complain. He did not bring the case here because of any error of the District Court in failing to award him attorneys' fees and expenses. The District Court could not have erred in that respect because that matter was never submitted to it for adjudication. The one thing which precipitated the case into this Court was Buchhalter's desire for all of Rude's interest in the escrow securities. We felt, and still may properly feel, that Rude's motion to dismiss Buchhalter's appeal, was and is absolutely good. But the Court has not passed upon it. We, therefore, feel warranted in stating, with the utmost deference, that upon further consideration it will appear to this Honorable Court that the circumstances under which costs in this Court were created, are such that Buchhalter should bear the cost of printing all that portion of the Record which he designated in his præcipe found in the Record at page 53.

We, therefore, submit that, in any view of the case, Buchhalter should not be given something which he has not even claimed and upon which no error was assigned and upon which no hearing was ever had.

[fol. 302] Such being the facts and circumstances, it is respectfully submitted that a rehearing be granted and that in any event the Opinion and Decree should be modified as herein petitioned.

All of which is respectfully submitted.

Ernest Morris, C. E. Wampler, Cass E. Herrington, Cass M. Herrington, Attorneys and Solicitors for I. Rude.

Certificate of Counsel

Each of the undersigned attorneys and solicitors for the above named I. Rude, hereby certifies:

In my judgment the foregoing Petition for Rehearing is well founded, and the same is not interposed for delay.

Denver, Colorado, January 11, A. D. 1932.

Ernest Morris, C. E. Wampler, Cass E. Herrington, Cass M. Herrington.

[File endorsement omitted.]

[fol. 303] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 506, January Term, 1932

No. 507, January Term, 1932

OPINION DENYING PETITION FOR REHEARING—January 23, 1932

McDERMOTT, Circuit Judge:

In a petition for rehearing it is earnestly insisted that this court is without power, according to the established usages of equity, to allow the expenses of litigation, including counsel fees, to the prevailing party; that the only counsel fees which may be allowed are those in the statute covering taxable costs.

The power of courts of equity over costs does not rest upon the statutes, but upon usage long continued. Newton v. Consolidated Gas Co., 265 U. S. 78; Ex parte Peterson, 253 U. S. 300. The rules of the High Court of Chancery of England have been adopted by the courts of the United States. Pennsylvania v. Bridge Co., 13 How. 518, 563. Such rules allowed costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton, or oppressive. In Guardian Trust Co. v. K. C. Southern Ry. Co. (C. C. A. 8), 28 F. (2d) 233, counsel fees were allowed the prevailing party. Judge Booth's opinion in that case traces the history of the allowance in equity of fees as between solicitor and client from the early English cases to the present; it is an exhaustive treatise on the subject, and a powerful authority in support of the power of equity to allow fees where equity and good conscience require it. That decree was reversed because it granted relief at variance with a prior mandate of the Supreme Court (281

U. S. 1), but the authority of Judge Booth's opinion was not impaired. The fact that the Guardian Trust Company was a trustee is not important; the allowance was not from the trust estate, but was against a stranger to the trust.

This opinion of the Eighth Circuit Court of Appeals, and the wealth of authorities therein cited, would be strong support for the decree directed by this court, if counsel fees had been included in the absolute decree against the appellant. That is not our decree, and counsel entirely misapprehended it. Only the costs between the parties—the taxable costs—were awarded against Rude, to be collected on [fol. 304] execution if need be. Counsel fees were not included therein. What this court did was to impose a condition upon the decree asked for and awarded the appellant. The situation is this: The appellant alleged that a fund was in the possession of an escrow agent, which had agreed to hold the fund until appellant and appellee agreed in writing upon its disposition; that the parties could not agree; the appellant asserted a lien thereon, sought its foreclosure and prayed "for such other and further relief as to the Court may seem just." Appellant made the escrow agent a defendant; the escrow agent prayed for instructions as to a disposition of the fund. The appellee alleged joint ownership of the fund, and that the only reason for a failure to agree on its disposition was the assertion of the "wrongful and fraudulent demands and conduct of the plaintiff," and appellee prayed for "such other and further relief as in equity and good conscience the facts warrant." In this court appellant earnestly and vigorously insisted that if his lien was not sustained, the court should terminate the litigation by a decree of distribution. Appellees resisted this, and claimed that appellant had forfeited any interest in the fund by his conduct.

For all practical purposes, the fund was in court; appellant devoted five pages of his brief to the proposition that "equity having jurisdiction, having all of the parties and the evidence before it, should order disposition of these funds and bonds in accordance with the respective rights of the parties." Many controlling authorities were cited, among them Kinney-Coastal Oil Co. v. Kieffer, 277 U. S. 488, 507, from which appellant quoted the following:

"It is a general rule that a court of equity, in a suit of which it has and takes cognizance, may administer com-

plete relief between the parties, even though this involves the determination of legal rights which otherwise would not be within the range of its authority. * * * And under that rule a court of equity in awarding relief to one party may impose conditions protecting and giving effect to correlative rights of the other."

In strict accord with appellant's contention and the authorities cited, a decree was directed, and conditions imposed that appeared to us to be equitable. Now it is asserted that we are without power to impose conditions on the decree. The authorities support appellant's original [fol. 305] contention. In addition to the controlling authority above cited, see Foster's Fed. Prac. (6th Ed.) p. 908, wherein the author cites many cases to the effect that "In some cases it enforces this by the entry of a conditional decree without reference to the pleadings," and 10 R. C. L. 357, "The decree should be adapted to the circumstances and necessities of each case and should be so designed as to put an end to the litigation and not to foster it. And of course the court may attach to the grant of relief any conditions that to it seem proper." See, also, 21 C. J. 667, and many cases there cited.

That the conditions imposed concerned attorney's fees is a mere coincidence. The appellant, as a condition to a decree of distribution prayed for by him, should be required to bear the loss occasioned by his own inequitable conduct. It was the assertion of a false and groundless claim that prevented a distribution of the fund without the aid of equity. Such inequitable conduct put the other parties to expense in order to procure a distribution. That such expenses happen to be in part attorney's fees is not fatal. In Trustees v. Greenough, 105 U. S. 527, 535, 536, the Supreme Court held:

"The feebill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require."

But, it is urged, the pleadings do not admit of such conditions. Both appellant and appellee plead the facts as

claimed by them, and both asked for general relief. In Lockhart v. Leeds, 195 U. S. 427, 437, it was held that "There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers." See, also, United States v. Amalgamated Sugar Co. (C. C. A. 10), 48 F. (2d) 156. The facts were pleaded and proven. We do not understand that the court is without power to impose an equitable condition on a decree unless one or the other of the parties [fol. 306] specifically prays for the imposition of a particular condition. The plaintiff very seldom prays that a condition be imposed that requires him to do equity; generally the defendant challenges the right of plaintiff to any relief, and hence does not ask for the imposition of conditions. The appellant's contention comes to this, that the court is powerless to impose any condition on a decree unless one of the parties requests it; and that the court has no constitutional power to impose a condition unless counsel is first advised of the condition which the court proposes to impose, and has an opportunity to be heard as to the propriety thereof. We do not agree. If a plaintiff comes into court and asks for an equitable decree, and all the facts are presented to the court, the chancellor has power to enter such decree as is just and equitable, and we know of no rule that requires the chancellor to submit to counsel the conditions which he proposes to impose, and for a hearing on each of such conditions, prior to the entry of the decree. If such were the law, the wholesome power of equity to condition a decree would be without substance.

It is urged that the trial court erred in excluding Rude's testimony concerning a telephone conversation with Buchhalter. Rude's denial of Buchhalter's testimony thereto was admitted, and an offer of proof was made of the excluded testimony, which we treated as testimony. Equity Rule 46. The testimony of Binstock which was excluded was corroborative of other testimony as to the preliminary negotiations, which we have found to be true.

Complaint is made because of the finding that Rude's suit was not in good faith. We have gone over the evidence again, and while it is possible that we have erred, we re-

main of the same opinion. It does not appear to be a case of mistake. The appellant's case was founded upon an alleged oral agreement which appeared to us to be improbable, which was flatly denied, and which did not accord with the circumstances. The language of the opinion is severe; but words should not be minced in characterizing the assertion of a false and groundless claim. It is suggested that the trial court did not find that Rude's claim was groundless. In equity the appellate court is not bound by the findings of the trial court. Furthermore, the trial court denied the plaintiff any relief, which finding could [fol. 307] only be predicated upon a finding that the story told by Mr. Rude was not true.

It is intimated that the opinion of this court reflects upon counsel for Mr. Rude. We did not so intend. Mr. Rude doubtless disclosed to his counsel the same state of facts to which he testified on the stand. If those facts were true, he was entitled to the relief prayed for, and there can be no possible reflection upon his counsel for presenting to the court Mr. Rude's version of the transaction. The facts in the case did not develop until the defendant introduced his evidence.

Complaint is made because this court did not pass upon the interesting legal questions presented by a motion to dismiss the Buchhalter appeal. One of the grounds of the motion was that the appeal was frivolous. We found that appeal to be without merit, and taxed the cost against Buchhalter, except for printing the record which was necessary in considering Rude's appeal. We saw no occasion for passing upon other difficult questions presented by the motion.

The petition for rehearing and to modify the opinion is denied.

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—Jan. 23, 1932

Before Honorable Robert E. Lewis, Honorable John H. Cotteral, and Honorable Orie L. Phillips, Circuit Judges

These causes came on to be heard on the petition of I. Rude for a rehearing herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed Feb. 1, 1932

Comes now the above named I. Rude, appellee in said cause numbered 506 and appellant in said cause numbered 507, by his attorneys and solicitors, and moves that an order be made and entered in each of said causes staying the mandate of this court pending application to the Supreme Court of the United States for certiorari and until final disposition of said application by said Supreme Court. [fol. 308] As grounds for this motion the said I. Rude respectfully shows unto the court that he has ordered from the clerk of this court a complete transcript of the record in said two causes for use upon said application in said Supreme Court and is preparing a petition for a writ or writs of certiorari in said two causes. That the said I. Rude will proceed with due diligence to file said record and petition for certiorari in said Supreme Court; that this motion is not made for delay and said petition for certiorari is not made for such purpose but the said I. Rude and his counsel believe that just grounds exist for the issuance of a writ of certiorari herein and that the petition therefor is well founded.

Dated at Denver, Colorado, this first day of February, A. D. 1932.

Ernest Morris, C. E. Wampler, Cass E. Herrington, Cass M. Herrington, Attorneys and Solicitors for the said I. Rude.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING STAY OF MANDATES—Feb. 1, 1932

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

These causes came on to be heard on motions for a stay of the mandates herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandates of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

[fols. 309 & 310] IN UNITED STATES CIRCUIT COURT OF APPEALS

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 1, 1932

The clerk of this court will please prepare a complete, certified transcript of the record in said causes numbered 506 and 507, for the use of the said I. Rude in applying to the Supreme Court of the United States for a writ or writs of certiorari to review the records in said two causes, said transcript to consist of the following, to-wit:

1. Transcript of the record as certified to this court by the clerk of the District Court of the United States for the District of Colorado.
2. Motion of appellee to dismiss the appeal in said cause No. 506.
3. The decree of this court in said cause No. 506.
4. The decree of this court in said cause No. 507.
5. The petition of the said I. Rude for rehearing in each of said two causes.
6. The order (or orders, if more than one) of this Court denying said petition for rehearing.
7. All opinions of this court in the above causes.

Dated at Denver, Colorado, this 1st day of February, A. D. 1932.

Ernest Morris, for Attorneys and Solicitors for the said I. Rude.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 311] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,550. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 736. I. Rude, petitioner, vs. Joseph Buchhalter. Petition for a writ of certiorari and exhibit thereto. Filed February 27, 1932. File No. 36,550.

FILE COPY

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CHARLES ELMORE
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SUPREME COURT OF THE UNITED STATES

October Term, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

October Term, 1931

No.

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, I. Rude, brings this petition for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Tenth Circuit, and shows as follows:

(A.)

Summary Statement of the Matter Involved.

The major questions involved are these: Does not the due process clause of the Constitution prohibit the Circuit Court of Appeals from making a decree which absolutely requires one party to pay the expenses of litigation and counsel fees of the other party, where such relief is granted *sua sponte* without any hearing or opportunity to be heard thereon? May the Court make such a decree even after a hearing? These questions, and others hereinafter presented, arise in the following manner:

The decree sought to be reviewed was rendered on December 17, 1931, by the Circuit Court of Appeals for the Tenth Circuit, in a cause numbered 506 upon the docket of that Court wherein Joseph Buchhalter was appellant and I. Rude was appellee (R. 276). The opinion of the Court is found at page 269 of the Record but has not yet been reported. Petitioner filed a petition for rehearing (R. 281) which was denied January 23, 1932 (R. 303, 307). The said decree condemns petitioner to pay "the expenses to which Joseph Buchhalter and the First National Bank of Denver, Colorado, have been put in this litigation, including reasonable attorneys' fees to be determined by the trial Court" (R. 276), upon the alleged ground that Rude's suit was not brought in good faith (R. 275).

The trial Court (District Court of the United States for the District of Colorado) by its decree, merely dismissed the suit at plaintiff's (petitioner's) costs (R. 45), which was the only relief demanded

by Joseph Buchhalter, defendant-appellant-respondent (R. 21, 273), and, by refusing Buchhalter's tendered findings of fact and conclusions of law and by denying Buchhalter's Motion to Amend Final Decree, the District Court twice expressly refused to find that Rude's suit was not brought in good faith (R. 38, 45, 47).

Basis of the Suit.

Petitioner and respondent Buchhalter had been joint and nearly equal owners of an undivided one-half interest in the properties of the Colorado Pulp and Paper Company which they acquired by turning in bonds of the Company at a Master's sale. The legal title to said *one-half* interest stood in the name of petitioner Rude who conveyed it to respondent Buchhalter and received back Buchhalter's promissory note for $67,500.00 secured by a deed of trust on a *one-fourth* interest. Buchhalter sold the one-half interest to one Binstock for substantially $28,000.00 cash and $92,500.00 in bonds of a new corporation to which Binstock and one Bronstine, owner of the other one-half interest, transferred the property. To enable the sale from Buchhalter to Binstock to be consummated, Rude surrendered said note and executed a request for a release of said deed of trust under an arrangement whereby the entire proceeds of said sale were placed in escrow with respondent the First National Bank of Denver, one of the defendants in the trial Court. The terms of the escrow were that the bank should hold said funds until Rude and Buchhalter should agree in writing as to the disposition thereof. Rude had consented that Buchhalter might make such

sale upon the condition that Rude receive $40,000.00 in cash (or at least all cash paid by Binstock) and Buchhalter's note for the balance due Rude, payable in six months or a year. Rude had repeatedly refused to accept any bonds (R. 63, 114, 120, 121, 122, 181). November 18, 1929, at Buchhalter's request, Rude, a resident of Dallas, Texas, came to Denver to make settlement with Buchhalter. They went to the bank, the escrow holder, and drew out all of the cash except $100.00. $11,615.22 was retained by the bank to discharge an indebtedness of Buchhalter's secured by his collateral. Rude received the balance, $16,365.34 (R. 4, 18).

The bill alleges that at the bank, it was agreed by and between Rude and Buchhalter that, if Rude would allow Buchhalter to have enough of the cash to discharge said Buchhalter's indebtedness to the bank, Buchhalter would secure a release of said collateral, sell the same on the next day and thus pay Rude in cash the balance due him, and that meantime the bonds should remain in the bank as security for Buchhalter's said promise.

The bill further alleged that it was impossible for Rude and Buchhalter to agree concerning disposition of the funds in escrow. The suit was to recover from Buchhalter the balance which Rude claimed, and to enforce an equitable lien on said bonds.

The bank was made a party because it was the escrow holder. Blount, Silverstein & Rosner were made parties because they had caused a writ of attachment, issued out of the State Court in a

suit against Rude and Buchhalter, to be executed by a levy on these bonds in the bank.

Buchhalter's answer denied the agreement alleged in the bill, averred that he and Rude were joint owners of the proceeds received from the sale to Binstock and alleged that Rude was in Court with unclean hands. Although suit was not on the $67,500.00 note—could not have been because the bill alleged and the answer admitted that the note had been canceled pursuant to the foregoing arrangement (R. 3, 17)—Buchhalter based his unclean hands defense upon the false premise that suit was on the note and that the same was but a fictitious instrument. Both the trial Court and the Court of Appeals held that the suit was on the agreement alleged to have been made at the bank (R. 261, 271), thus rejecting Buchhalter's contention that suit was on the canceled note.

January 30, 1931, the District Court, in a memorandum opinion, held that the agreement alleged in the bill had not been established by the required amount of evidence and that the bill should be dismissed (R. 255, 262). Thereafter, on April 7, 1931, the date of the decree of the District Court, Buchhalter for the first time disclosed that his defense had been pleaded and conducted in the hope that he could secure a decree awarding all of the bonds to him, thus depriving Rude of all interest in the escrow. This disclosure was made in Buchhalter's requested findings of fact and conclusions of law (R. 38) and in his Motion to Amend Final Decree (R. 45). Failing to realize that hope, Buchhalter promptly (within six days) appealed

to the Circuit Court of Appeals (R. 47-53). Buchhalter's assignment of errors discloses that, aside from some complaints as to the findings (from which no appeal lies) the sole object of his appeal was to obtain a decree "that the legal title to all and singular of said mentioned funds and bonds in escrow, be held and declared to be in this defendant and appellant (Buchhalter); that the First National Bank of Denver, Colorado, as escrow holder of said funds and bonds, be directed and required to turn over and deliver unto this defendant (Buchhalter), all and singular, the same; * * *" (R. 53).

Buchhalter made nobody a party to his appeal except Rude. Obviously, therefore, even if there had otherwise been legal grounds therefor, the Appellate Court was without jurisdiction to grant Buchhalter any relief because of the absence of indispensable parties, namely, the First National Bank of Denver, escrow holder, and Blount, Silverstein & Rosner, holders of the attachment lien. Accordingly Rude filed in the Circuit Court of Appeals a motion to dismiss Buchhalter's appeal upon the grounds: (a) that, having obtained all the relief sought by his pleading, Buchhalter was without right of appeal; (b) that there had been no summons and severance; (c) absence of indispensable parties; and (d) said appeal was frivolous (R. 265-268). This Motion to Dismiss was argued in the Appellate Court (R. 269) but that Court refused to pass upon it (R. 307).

June 18, 1931, Rude filed a cross appeal from the decree of the District Court and sought to obtain the relief prayed for in his bill (R. 237, 239-

250), or in the alternative that "equity having jurisdiction, having all of the parties and the evidence before it, should order disposition of these funds and bonds in accordance with the respective rights of the parties" (R. 304). To Rude's appeal he made parties all who were parties in the trial Court. Rude's appeal, therefore, being the only one which brought all parties before the Circuit Court of Appeals, was the only one in which any relief could properly be granted, but the Court disposed of Rude's appeal by affirming the decree of the District Court at Rude's costs (R. 277). The sole relief was granted in Buchhalter's appeal (R. 276) wherein, as has been made to appear, the Court had no jurisdiction.

Precise Questions for Determination.

1. May a court of equity under any circumstances require the plaintiff to pay defendant's expenses of litigation and counsel fees merely because it is of the opinion that the suit was not brought in good faith?

2. May a Circuit Court of Appeals do so where, as a basis for such decree, it must first make findings of fact which the District Court expressly refused and the evidence justifies such refusal?

3. May such Appellate Court *sua sponte* decree the payment of such expenses and attorneys' fees without violating the due process clause of the Constitution?

4. May such Appellate Court, on appeal by the successful party and in the absence of indispensable parties, disregard appellee's motion to dis-

miss and award the appellant affirmative relief, at appellee's costs, which appellant did not seek in either court?

5. May a court of equity, under the guise of imposing conditions, make an absolute decree requiring the payment of such expenses and counsel fees without giving the party so condemned the option to reject the so-called conditions and all relief?

6. May the Circuit Court of Appeals award relief to a party who does not appeal and is not even a party to the appeal?

(B.)

Reasons Relied on for the Allowance of the Writ.

1. The decree awarding *expensa litis* and counsel fees was entered by the Court *sua sponte* without any hearing or opportunity therefor and hence is in violation of Amendment V of the Constitution.

2. The decree was entered without jurisdiction because:

(a) Respondent Buchhalter, the appellant, obtained all the relief which he sought in the trial Court. Not being a party aggrieved he had no right of appeal.

(b) Indispensable parties—namely, the bank and Blount, Silverstein & Rosner—were absent from the Circuit Court of Appeals.

(c) Counsel fees in behalf of the First National Bank *were* sought in the District Court, but denied (R. 38, 43). The bank did not appeal and

made no appearance in the Circuit Court of Appeals. Hence, the decree of the District Court is *res judicata* that the bank is not entitled to such fees. Nevertheless, the decree of the Circuit Court of Appeals awards them and in this respect is contrary to the decisions of this Court in *United States v. Blackfeather*, 155 U. S. 180; *Clark v. Wilson*, 103 U. S. 766; *the Stephen Morgan v. Good*, 94 U. S. 599; and *the Maria Martin v. Northern Transp. Co.*, 12 Wall. 31.

3. The right of the Court to make one party bear the other party's expenses of litigation is an *important question of general law*. The way in which this question was decided by the Circuit Court of Appeals is untenable and in conflict with all precedent (15 C. J. 114, Sec. 248).

4. The decision allowing such expenses including attorney's fees is contrary to applicable decisions of this Court.

Oelrichs v. Williams, 15 Wall. 211.
Arcambel v. Wiseman, 3 U. S. 306.
Hauenstein v. Lynham, 100 U. S. 483.

5. If this Court should be of the opinion that this question is not entirely settled by the foregoing decisions, the matter is of such importance that it should be settled by this honorable Court.

6. In refusing to pass upon the Motion to Dismiss Buchhalter's appeal, the Circuit Court of Appeals has allowed an appeal from a decree wholly in said appellant's favor; and its decision is contrary to the decision of this Court in *Corning, et al., v. The Troy Iron and Nail Factory*, 15 How. 451,

and contrary to the decisions in the Eighth Circuit in *Houchin Sales Co. v. Angert*, 11 Fed. (2d) 115; *Guarantee Co. of Nor. Amer. v. Phenix Ins. Co.*, 124 Fed. 170, 59 C. C. A. 376; *Rogers v. Penobscot Mng. Co.*, 154 Fed. 606, 83 C. C. A. 380, and contrary to the decision of the First Circuit in *Harding v. Fed. Nat'l Bk.*, 31 Fed. (2d) 914.

7. The decision of the Circuit Court of Appeals contained in the opinion denying petition for rehearing, to the effect that a Federal Court of Equity may impose its own conditions without giving the party his option to reject them (R. 303-306) is untenable and contrary to all authority.

McPherson v. Cox, 96 U. S. 404.
21 C. J. 668, Sec. 849 Equity.
Gage v. Thompson, 161 Ill. 403.
Alexander v. Merrick, 121 Ill. 606.
Mechanics' Bank v. Lynn, 26 U. S. 376.
Kinney Coastal Oil Co. v. Kieffer, 277 U. S. 488.

8. In all of the foregoing particulars the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and com-

plete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 506, Joseph Buchhalter, Appellant, v, I. Rude, Appellee, and that the said decree of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

I. RUDE,
By ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

October Term, 1931

No.

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the District Court was rendered January 30, 1931 (R. 255) but never officially reported.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit, was rendered

December 17, 1931 (R. 269), but has not yet been officially reported.

The opinion of said Circuit Court of Appeals denying petition for rehearing was rendered January 23, 1932 (R. 303), but has not yet been officially reported.

II.

Jurisdiction.

Jurisdiction is invoked under Judicial Code, Section 240 as amended by the Act of February 13th, 1925, *43 Stat. 938, 28 U. S. C. A. Section 347.*

III.

Statement of the Case.

The statement of the case as contained in the petition for writ of certiorari is sufficient.

IV.

Points Relied Upon and Summary of the Argument.

POINT A: In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner Rude's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of Amendment V of the Constitution.

POINT B: The decree awarding such fees and expenses is contrary to principle and to all precedent.

POINT C: The doctrine that a Court of Equity may grant relief only upon conditions is inapplicable.

POINT D: The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

POINT E: The Circuit Court of Appeals erred in holding that "it was the assertion of a false and groundless claim that prevented a distribution of the fund without the aid of equity."

POINT F: The Circuit Court of Appeals erred in disregarding petitioner's motion to dismiss Buchhalter's appeal and in awarding respondent Buchhalter affirmative relief at petitioner's costs.

POINT G: The Circuit Court of Appeals erred in awarding any relief to respondent the First National Bank of Denver.

V.

ARGUMENT.

Point A.

In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner Rude's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of Amendment V of the Constitution.

Respondent Buchhalter never claimed expenses or attorney's fees either in the District Court or in the Circuit Court of Appeals. Neither in his Answer (R. 13-22) nor in his Requested Findings of Fact and Conclusions of Law (R. 38-43) nor in his Motion to Amend Final Decree (R. 45-47) nor in his Assignment of Errors (R. 48-53) nor anywhere else in the case did Buchhalter ask any such relief as that granted by the Circuit Court of Appeals. The first mention of the subject—expenses of the litigation and attorney's fees—is in that Court's opinion (R. 275-276).

The right to be heard is one of the most valuable rights which our Constitution guarantees to all. But the Circuit Court of Appeals has denied petitioner that right. True, petitioner Rude filed in that Court his petition for *re*-hearing, but he was *never heard* thereon and said petition was promptly denied in an opinion wherein the Court said he was not entitled to any hearing on the subject of attorney's fees and/or expenses (R. 306). To award one litigant his attorney's fees and other expenses under the circumstances of this case has never been done either with or without a hearing on the subject. We respectfully submit that to do so without a hearing is to deprive Rude of his property without due process of law in violation of Amendment V of the Constitution of the United States. (*Hovey v. Elliott*, 167 U. S. 409; 42 L. Ed. 215.) For that reason alone, we think the Petition for Certiorari should be granted.

In the *Hovey* case, *supra*, this Court reaffirmed its opinion in *Reynolds v. Stockton*, 140 U. S. 254,

35 L. Ed. 464. In the *Reynolds* case the Court said that a judgment is not valid when it is "not responsive to the issues presented," and quoted with express approval the following language in the case of *Munday v. Vail*, 34 N. J. L. 418:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the Court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

When parties enter upon or determine to continue litigation, it should be possible for them to *know* all that the Court could possibly adjudge against them. The pleadings of their adversaries are intended to give litigants this information and are the measure of the Court's power. There is nothing in the pleadings, nor in the briefs, nor anywhere else in the case, which could possibly have given either Rude or his counsel any intimation that expenses or attorneys' fees might be recovered from him. The one thing which Buchhalter claimed in the District Court was that the suit was on the note, that it was a fictitious instrument and that the suit should be dismissed. Both the Circuit Court of Appeals and the trial Court have held that the suit was *not* on the note, as of course it couldn't have been. The only relief which Buchhalter asked was dismissal and, later, Rude's interest in the escrow securities.

Under these circumstances, we respectfully and most earnestly contend that the Circuit Court of

Appeals was without jurisdiction or power to award either expenses or attorneys' fees.

Point B.

The decree awarding such fees and expenses is contrary to principle and to all precedent.

The Circuit Court of Appeals, contrary to the opinion of the District Court, held that the suit was not brought in good faith, i. e., that it was vexatious. We shall presently show that the Circuit Court of Appeals erred in so holding. But, under all of the authorities, even if it were true that the suit was not brought in good faith, was without probable cause, in short, was vexatious, that fact would not be a sufficient predicate upon which to base a decree for expenses and attorney's fees.

The "fee bill" statute (U. S. C. A. title 28, Secs. 571-572) provides:

> "Section 571. Fees to be taxed. The following fees *and no other shall be taxed and allowed to attorneys, solicitors*, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

> "Section 572. Attorneys, solicitors, and proctors, * * * on a final hearing in equity * * *, a docket fee of $20.00."

While it is sometimes loosely stated that those sections do not bind courts of equity, such courts have not gone beyond this statute in awarding attorneys' fees except in seven classes of cases (none of which embraces the case at bar) namely:

(1) Where there is another statute authorizing the allowance of attorneys' fees.

(2) Where there is a rule of court.

(3) Where there is a contract.

(4) Where one party has brought a fund into court in which others are allowed to share.

(5) Where a trustee is put to expense concerning the trust.

(6) Where a receiver has been improperly appointed.

(7) In that class of cases where it has been the established practice in equity to allow such fees.

The seventh class is broad enough to include all the others.

The leading case on the subject, often quoted and followed, is *Oelrichs v. Williams*, 15 Wall. 211; 21 L. Ed. 43. That was a suit in equity wherein this Court said:

> "In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is

no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, *however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected.* The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the Court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." (Italics ours, except the Latin.)

In an earlier case, *Arcambel v. Wiseman*, 3 U. S. 306, 1 L. Ed. 613, the lower Court in its decree allowed "a charge of 1600 dollars for counsel's fees". This Court said of this:

"We do not think that this charge ought to be allowed. The general practice of the

> *United States* is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the Court, till it is changed, or modified, by statute."

In *Hauenstein v. Lynham*, 100 U. S. 483, 491, 25 L. Ed. 628, 631, this Court said:

> "It is a settled rule in this Court never to allow counsel on either side to be paid out of the fund in dispute."

Prior to adoption of the "fee bill" statute, it had been the practice to allow counsel fees in certain cases in admiralty. But since that statute this Honorable Court has held that the Court has no power to award counsel fees beyond those prescribed in that Act of Congress. *The Baltimore v. Rowland*, 75 U. S. 377, 19 L. Ed. 463, 467. In that case the Court said:

> "Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compenation shall be allowed.
>
> "Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite

party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L., 161."

In *Motion Picture Patents Co. v. Steiner*, 201 Fed. 63, 64, it was held that a court of equity has no power "to award an additional allowance to the prevailing party who has been put to 'considerable annoyance and expense' by reason of the prolonged examination of witnesses by his adversary's counsel."

The only case we have been able to find which contains any language which could possibly be construed to permit the taxation of costs as between solicitor and client, in a case of this character, is *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 Fed. (2d) 233 (8th Cir.). That case was one where a *trustee* was awarded expenses and attorney's fees in litigation *concerning the trust* and hence came under the fifth exception above mentioned. And the Decree of the Circuit Court of Appeals was reversed by this Court in *Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U. S. 1, 74 L. Ed. 659. It is true that this Honorable Court did not pass upon the power of a court of equity to award such costs, saying: "Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs and to make such allowance should be clearly expressed in the Decree". The original Decree of the District

Court in that case made no provision for the taxation of such costs. That Decree as affirmed required the "taxation of costs * * * under the principles, rules and practice in equity". Under the mandate it was claimed in the District Court that the above quoted language gave authority to tax costs as between solicitor and client, provided that such could be done "under the principles, rules and practice in equity". The District Court disallowed the application for such taxation, the Circuit Court of Appeals reversed the decree and allowed such costs and this Court reversed the Decree of the Circuit Court of Appeals and affirmed that of the District Court. Hence, the only thing determined in that case was that the "taxation of costs * * under the principles, rules and practice in equity" does not permit the allowance of costs as between solicitor and client. In other words, the term "costs" is not broad enough to permit the awarding of expenses and attorneys' fees as incident to the judgment. Judge Van Valkenburgh was then the district judge and he held as follows:

> "'The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law:
>
> "'First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not sustained, but found to be baseless and unwarrantable.

> "'Second. Where a fiduciary relation exists between the parties, such as trustee and *cestui que* trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such *cestui que* trust, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable'." (28 Fed. (2d) 234.)

In other words, lack of good faith in bringing the action is not enough. The case must be one where the plaintiff therein has made, but failed to sustain, gross charges of fraud and misconduct. There was no such charge against Bu hhalter. In *Kansas City Southern Ry. Co. v. Guardian Trust Company, supra,* counsel for the trust company filed a brief in this Court in which they sought to sustain the decree of the Circuit Court of Appeals. In that brief, which appears as a part of the case as reported, it is claimed that the practice in this country is to impose costs as between solicitor and client as indemnification for "litigation which is wholly baseless and unwarranted". A long list of cases is cited in alleged support of that proposition. We have examined them all with care and not a single one supports it. There simply is no authority in this country for awarding such costs merely because the Court finds that the suit is not brought in good faith.

In its opinion denying petition for rehearing herein the Circuit Court of Appeals regards the *Guardian Trust Company* case as unimpaired authority and as an exhaustive treatise on the subject. And in that opinion it is said, "The rules of the High Court of Chancery of England have been adopted by the courts of the United States" and "such rules allowed costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton, or oppressive". We respectfully assert that the Circuit Court of Appeals was in error in both of said statements.

(1) The rules of the High Court of Chancery of England are no longer followed in this country.

In the equity rules first promulgated by this, the Supreme Court of the United States, in February, 1822, we find the following:

"RULE XXXIII.

> "In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."
>
> *Hopkins Federal Eq. Rules*, 7th ed., p. 42.

Twenty years later, this Honorable Court considered that equity practice in this country had become sufficiently well established that the rules of the High Court of Chancery should be regarded "not as positive rules, but as furnishing just analogies to regulate the practice". Accordingly, in lieu of Rule

XXXIII above quoted there was substituted Rule XC of the Rules of 1842, which reads:

> "In all cases, where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice."
>
> *Hopkins' Federal Equity Rules*, 7th ed., p. 61.

The new Federal Equity Rules, adopted in 1912, no longer refer us to the English practice for any purpose. Accordingly, whatever the practice may be, or may once have been, in the Old Country, that practice is no longer any authority for awarding expenses of litigation or attorney's fees in this country.

(2) But it was never the practice of the High Court of Chancery to allow "Costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton or oppressive".

We have examined with care, all of the English cases cited by Judge Booth in alleged support of his opinion in the *Guardian Trust Company* case, *supra*, as well as all others which we have been able to find. None of them supports that opinion. The only one which passed squarely upon the point is *Turner*

v. Collins, L. R. 12 Eq. Cas. 438, and that is directly opposed to the conclusion of Judge Booth. That case was a suit by a beneficiary against the trustees and other beneficiaries. In delivering his opinion, the Vice-Chancellor said:

> "I came to the conclusion that the litigation was as unjustifiable as any I have ever had before me."

But he also concluded in his opinion:

> "I am sorry to come to the conclusion in this case that it is not in my power to give the defendants beneficially interested their costs as between solicitor and client. When the case was heard before me, I expressed a strong desire to do so, feeling that it was one in which I ought, if possible, to make the costs a complete indemnity. But I am now satisfied that it is not the course of the Court to make such an order in dismissing a bill, except where the parties are in a fiduciary position, or where there is something in the nature of scandal, such as gross charges of fraud which are not sustained."

The Vice Chancellor then reviews the authorities which imped him to that conclusion. He did, however, allow such costs to the trustees but the Court of Appeals in Chancery reversed even that part of the decision, saying, "the trustees will have their costs from the plaintiff, but only as between party and party". (7 Ch. App. 329.)

There is no scandal, no charge of fraud in the bill filed by petitioner Rude. There is no fiduciary relation between him and Buchhalter. Hence, there was no basis for charging Rude with Buchhalter's expenses and attorneys' fees.

We now briefly refer to the other English cases upon which Judge Booth relied. It will be seen that in all of them there was either a fiduciary relation or charges of fraud, scandalous matter, or that the point now under consideration was not involved.

Andrews v. Barnes, 39 L. R. Ch. Div. 133, was a suit against trustees and costs as between solicitor and client were allowed because otherwise the trustees' expenses would have depleted the trust fund.

In *Mordue v. Palmer*, L. R. 6 Ch. App. 22, there was a "fiduciary relation between the parties".

In *Brown v. Burdett*, L. R. 40 Ch. Div. 244, it was held that unnecessary costs of litigation could not be taken out of the estate of the decedent.

Johnson v. Telford, 3 Russ. 477, was a case holding that even a trustee may not in every instance have his solicitor's fees taxed as costs against the trust estate.

Eady v. Elsdon, 70 L. J. K. B. 701, 84 L. T. R. 615, was a case involving the costs of a solicitor appointed as a guardian *ad litem* for an infant. Moreover, costs as between solicitor and client were disallowed.

In re Brown, a Solicitor, L. R. 4 Eq. Cas. 464, involved the right to pay the fees of a "solicitor for

a trustee under a will" out of the trust estate. Moreover, as the report of the case shows, this matter was regulated by statute, *6 and 7 Vict.*, C. 73.

So in *Eland v. Medland*, L. R. 41 Ch. Div. 476, the question was whether trustees could be allowed their costs out of the trust estate. It does not appear that costs between solicitor and client were involved.

In *Halsbury's Laws of England*, Vol. 26, p. 798, cited by Judge Booth in 28 F. (2d) 240, it is said concerning the power of a court of equity by special order to award costs as between solicitor and client,

> "Such orders are usually made in favor of trustees and personal representatives."

Re Davies; Jenkins v. Davies, 64 L. T. R. 824, also involved costs in a suit for construction of a will.

In *Simpson v. Malherbe and others*, 4 Giff. 707, the suit was instituted for a purpose other than that disclosed by the bill and in collusion with some of the defendants. There were charges of fraud.

In *ex parte Simpson*, 15 Ves. Jr. 476, a solicitor filed a false and *scandalous* affidavit in a bankruptcy proceeding. *He* was ordered to pay all the costs.

Dungey v. Angove, 2 Ves. Jr. 303, was another collusive suit so scandalous that the plaintiff and his solicitor were ordered to pay all the expenses and the solicitor to show cause why his name should not be struck off the roll.

In *Courand v. Hanmer*, 9 Beav. 3, a Receiver was allowed his expenses out of the fund.

Fane v. Fane, L. R. 13 Ch. Div. 228, was also a suit by a *cestui que* trust against the trustee. Plaintiff was required to pay the trustee's expenses.

Surely the decision of the Eighth Circuit, Court of Appeals, in the *Guardian Trust Company* case is seriously impaired when that Court, to support its unprecedented decision, was driven to the supposed English practice, no longer followed in this country, and, as we have seen, not actually ever existing even in England.

There is no American authority for the allowance of expenses and attorney's fees, or either, in a case of this character. It is stated in the *Guardian Trust Company* case, 28 Fed. (2d) at page 241, that the state courts have awarded such expenses, but such is not the case. Two cases are cited in support of that statement, *Danbury v. Robinson*, 14 N. J. Eq. 324, which mentions merely "costs" but awards none, and *Thome v. Allen*, (Ky.) 70 S. W. 410, and 71 S. W. 431. In the latter case there was a trust estate and the allowance was to the trustee.

There is nothing in *Trustees v. Greenough*, 105 U. S. 527, which supports the conclusion of the Circuit Court of Appeals in the present suit. That case simply reaffirmed the well-established doctrine, as stated by Mr. Justice Bradley in the fourth headnote, that,

> "One jointly interested with others in a common fund and who in good faith main-

> tains the necessary litigation to save it from waste and destruction, and secure its proper application, is entitled, in equity, to reimbursement of his costs as between solicitor and client, either out of the fund itself or by proportional contribution from those who receive the benefit of the litigation."

The mere fact that the Court has control over the fund does not authorize the payment therefrom of counsel fees and other expenses. Such payment is not authorized except in cases where the expenses incurred have been for the benefit of all having such interest.

15 C. J. 105.

Kimball v. Atlantic States L. Ins. Co., 223 Fed. 463.

Gund v. Ballard, 80 Neb. 385.

Ryckman v. Parkins, 5 Paige's Ch. Reps. (N. Y.) 543.

In the case last cited the Chancellor said:

> "As between party and party, the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties. Where interests of the parties are adverse, nothing beyond the legal taxable costs can be allowed by one party against the other."

Conclusion on This Branch of the Case.

As will hereinafter be more fully shown, a court of equity is without power to impose arbitrary conditions. The Court must find its authority in established equitable principles which may not be expanded or ignored according to the individual opinion of the judge as to what would be just in the particular case. It is contrary to the established practice to compel one party to pay the expenses incurred by his adversary. This Court has so declared in *Oelrichs v. Williams*, *Arcambel v. Wiseman* and *Hauenstein v. Lynham*, *supra*. The decree of the Circuit Court of Appeals awarding respondent Buchhalter his counsel fees and other expenses is clearly erroneous, as well as in conflict with the Constitution, and should be reversed.

Point C.

The doctrine that a Court of Equity may grant relief only upon conditions is inapplicable.

1. Conditions may not be arbitrary, but must be "warranted by settled principles of equity jurisprudence".

Lurton, J., in Compton v. Jesup, 68 Fed. 263, 316; 15 C. C. A. 397.
Pomeroy's Eq. Jur. (4th ed.) Sec. 386.
Mantermach v. Studt, 240 Ill. 464, 469.
Lindell v. Lindell, 150 Minn. 295, 299.
Alexander v. Shaffer, 38 Nebr. 812, 816.

In the case last cited the Supreme Court of Nebraska said:

"The maxim that 'He who seeks equity

> must do equity' has never been so applied as to justify a court in imposing arbitrary conditions in order to carry out what, in the individual opinion of the chancellor, would amount to substantial justice between the parties. The rule only requires the plaintiff to do 'equity'; that is, to do what upon established legal principles he should be required to do."

Since it is contrary to the settled principles of equity jurisprudence to compel one party to pay his adversary's expenses of litigation, the Circuit Court of Appeals was without power to do so under the guise of imposing conditions.

2. Even where conditions are proper they may not be absolute. The party should have his option to reject the whole decree.

> 21 C. J. 668, Equity, sec. 849.
> *1 Pomeroy's Eq. Jur.* (4th ed.) sec. 385.
> *Gage v. Thompson*, 161 Ill. 403, 407.
> *Alexander v. Merrick*, 121 Ill. 606, 614.

In the case last cited the Supreme Court of Illinois said:

> "Although the relief may be granted on condition that complainant pays the money, yet he can not be compelled to pay unless he desires the relief. The correct practice is for the Court to impose equitable terms, and, in case the complainant declines or refuses to comply with those terms, to dismiss his bill."

Despite the opinion of the Circuit Court of Ap-

peals denying petition for rehearing (R. 303) to the contrary, we submit that the decree herein is absolute and in no wise conditional. It is true that Buchhalter's expenses and attorney's fees are ordered to be paid out of Rude's share of the funds and bonds in escrow, and not otherwise. But there are $90,000 in bonds besides interest and principal which has been paid. Petitioner Rude owns over one-half thereof. The amount claimed by Blount, Silverstein & Rosner under their attachment lien is only $10,000, interest and court costs (R. 137, 139, 157). Accordingly Rude's share of the escrow is much more than ample to pay all prior charges, liens claimed and any expenses and attorney's fees. Therefore payment out of his share of the escrow is the same as payment out of pocket. If this is not so, if these expenses and attorney's fees awarded Buchhalter require all of Rude's share of the funds and bonds in escrow, then indeed the Circuit Court of Appeals has done indirectly what it expressly held could not be directly done, namely, it has awarded Rude's interest in the escrow funds and bonds to Buchhalter. At all events the decree is absolute and not conditional. It absolutely requires payment of Buchhalter's expenses and attorney's fees out of Rude's property and gives Rude no right to reject the relief awarded or to refuse to perform the decree. In this respect the decree is clearly erroneous because, according to equitable principles and practice "the conditions of the relief do not constitute an affirmative decree against plaintiff. He may perform them or not at his option."

21 C. J. 668, and other authorities, *supra.*

Point D.

The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

Buchhalter, in his requested findings of fact and conclusions of law (R. 42), and in his motion to amend final decree (R. 45), asked the trial court to hold that Rude was in court with unclean hands, that Rude must have known that his suit had no foundation in fact, that his testimony was in large part false. This the trial court refused to do, which amounts to an affirmative finding that Rude's suit was *not* brought in bad faith. But the Circuit Court of Appeals made a contrary finding (R. 275) and said, "In equity the appellate court is not bound by the findings of the trial court" (R. 306).

It is true that the findings of the trial court are not *conclusive* on the appellate court. Nevertheless, such findings are presumptively correct and will not be disturbed unless the trial court has either misapprehended the evidence or gone against the clear weight thereof.

Medsker v. Bonebrake, 108 U. S. 66.
Tilghman v. Proctor, 125 U. S. 136.
American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129 (7th Cir.).
Fineup v. Kleinman, 5 Fed. (2d) 137 (8th Cir.).

While space will not permit the clearest possible demonstration herein that the evidence was much more than ample to show good grounds for institu-

tion of the suit, if this Honorable Court's other pressing duties will permit the reading of the portions of the record to which we now refer, it will there conclusively appear that there was an agreement that Rude was to have cash out of the proceeds of the sale to Binstock and was not to be required to accept any bonds. Not only Rude, but Buchhalter's witness Block, and even Buchhalter himself, testified that, when Buchhalter wanted to sell to Binstock, Rude said he would not accept any bonds but would not stand in the way of a deal; that, if Buchhalter wanted to sell, he might do so provided Rude be given all cash paid by Binstock, and Buchhalter's note for the balance to which Rude would be entitled (R. 63, 114, 120, 121, 122, 181). Rude then left Colorado and Buchhalter concluded the sale to Binstock in Rude's absence. By making such sale under such circumstances, Buchhalter accepted Rude's conditions and thereby became bound to pay Rude the cash and give him a note for the balance. The agreement alleged in the bill was but a modification of Buchhalter's already existing obligation to give Rude cash, not bonds. *Moreover, Buchhalter was impeached by four reputable witnesses who testified that his reputation for truth and veracity was bad* (R. 163, 170, 171, 172).

In *Medsker v. Bonebrake*, 108 U. S. 66, *supra*, this Court reversed a decree sustaining exceptions to a *master's* report because there was sufficient evidence to sustain the report and the master, before whom the witnesses had personally appeared, had a better opportunity to judge of their credibility. So

here, the District Court which heard the testimony in open court, had a much better opportunity to judge as to Rude's good faith. The trial court having determined upon sufficient evidence that the petitioner Rude did not bring his suit in bad faith, the Circuit Court of Appeals erred in finding to the contrary.

The same is true of the finding of the Circuit Court of Appeals that Rude's testimony was materially false (R. 275). The only testimony contradicting Rude's evidence as to the agreement sued on, was that of the impeached Buchhalter. While it is true that Blount, Silverstein & Rosner testified that the $67,500 note was given under circumstances different from those related by Rude, *the suit was not on the note*, the note was set out merely "by way of background" (R. 271) and was at most a collateral matter.

Point E.

The Circuit Court of Appeals erred in holding that "it was the assertion of a false and groundless claim that prevented a distribution of the fund without the aid of equity".

The above quoted portion of this point is taken from the opinion of the Circuit Court of Appeals denying petition for rehearing (R. 305). We respectfully submit that such statement is contrary to the evidence and inconsistent with other portions of the opinions of that Court. Both the District Court and the Circuit Court of Appeals held that the funds and bonds in escrow are owned by Rude and Buchhalter in the proportion that $61,000 bears to

$53,922 (R. 44, 275). The documentary evidence conclusively supports such holdings (Exhibit B, R. p. 196). Nevertheless, Buchhalter contended at the trial (R. 130) and in the Circuit Court of Appeals (R. 52, Par. 15) that his interest was as $59,000 bears to $61,000. In his answer Buchhalter alleged three times that his interest in the escrow was equal to Rude's (R. 16, 19). At another place he alleged that his interest was "approximately" equal to Rude's (R. 16). At still another place Buchhalter alleged that his and Rude's respective interests were subject to possible minor accountings between them (R. 17). In the Circuit Court of Appeals Rude asked that the funds and bonds be distributed between him and Buchhalter. Buchhalter resisted this (R. 304).

The decree of the Circuit Court of Appeals apportions the funds and bonds "between I. Rude and Joseph Buchhalter in the proportion that $61,000 bears to $53,922, *subject to any items of accounting that may be established between them.* Accordingly it was never possible for Rude to obtain his just proportion without resort to equity. An accounting has always been and still is necessary. The Circuit Court of Appeals was, therefore, manifestly wrong in holding that the assertion of Rude's claim to cash prevented distribution without the aid of equity. If Rude's demand for cash put Buchhalter to expense, Buchhalter's demand for more than his just share likewise put Rude to expense. Buchhalter not only claimed *more* than his proportionate share on the basis of the respective amounts invested, but he

also put Rude to great expense in defending against Buchhalter's unconscionable, abhorrent and wholly unfounded claim to *all* of the funds and bonds in escrow.

Point F.

The Circuit Court of Appeals erred in disregarding petitioner's motion to dismiss Buchhalter's appeal and in awarding respondent Buchhalter affirmative relief, at petitioner's costs.

Of the four grounds of the motion (R. 266-268) two are so unquestionably sound that we discuss them only.

(1) Indispensable parties were omitted. The First National Bank of Denver is the escrow holder of these funds and bonds, but was not made a party to the appeal. And yet Buchhalter prayed in his assignment of errors "that the First National Bank of Denver, Colorado, as escrow-holder of said funds and bonds, be directed and required to turn over and deliver unto this defendant (Buchhalter) all and singular, the same" (R. 53). But the bank being absent, the Circuit Court of Appeals had no jurisdiction to give it any such direction or to order it to do anything else. The bank is not bound by the decree and may refuse to perform it if it sees fit. Moreover, the garnishee summons issued out of the state court requires the bank as garnishee to hold these funds and bonds subject to the order of that court. The Circuit Court of Appeals surely had no jurisdiction to order an absent party to disobey the process of another court. It is no answer to say that no such thing was attempted. The point is that

the Circuit Court of Appeals had no jurisdiction to proceed at all. Neither is it any answer to say that all necessary parties were before the Court in Rude's appeal. No relief was granted in Rude's appeal. The decree of the District Court was affirmed (R. 277), while in Buchhalter's appeal that decree was reversed with directions (R. 276).

The other defendants, Blount, Silverstein & Rosner have an attachment lien upon these same funds and bonds. They likewise were not made parties to Buchhalter's appeal. But Buchhalter, one of the defendants in the attachment suit, sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him. In the absence of the plaintiffs in the attachment suit, the Circuit Court of Appeals was clearly without jurisdiction to make any order respecting the disposition of the attached property.

Davis v. Merc. Trust Co., 152 U. S. 590, wherein this Court said:

> "All parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal."

(2) Buchhalter's appeal was frivolous.

An appeal is frivolous "either because concluded by previous authority or because of its absolutely frivolous nature."

Deming v. Carlisle Pack. Co., 226 U. S. 102, 105, 107.

Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226.

Pennywit v. Eaton, 15 Wall. 382, 21 L. Ed. 140.

That Rude, having asserted but failed to sustain a lien, was not thereafter precluded from asserting ownership, has long been settled.

Wm. W. Bierce, Ltd., v. Hutchins, 205 U. S. 340, 51 L. Ed. 828, 833.

Barnsdall v. Waltemeyer, 142 Fed. 415 (C. C. A. 8th Cir.).

Water, Lgt. & Gas Co. v. City of Hutchinson, 160 Fed. 41 (C. C. A. 8th Cir.).

Friederichsen v. Renard, 247 U. S. 205, 62 L. Ed. 1075.

That Buchhalter's appeal was "absolutely frivolous" conclusively appears from his own answer wherein he alleged no less than eleven times that Rude was a joint owner of the paper mill and in the proceeds of its sale (R. 14, 15, 16, 17, 18, 19, 20). That Buchhalter could not thereafter obtain a decree awarding himself full and complete ownership is so obvious that his appeal, wherein he sought such a decree and that only, was clearly "absolutely frivolous". His appeal should have been dismissed, but the decree of the Circuit Court of Appeals awards him other relief, which he resisted, and taxes the cost of printing the record to Rude.

Point G.

The Circuit Court of Appeals erred in awarding any relief to respondent the First National Bank of Denver.

The decree also awards the bank its expenses and attorney's fees. It might have been proper for the District Court to have done so because the bank is in effect the trustee of these funds and bonds. But the District Court did not do so and expressly refused the bank attorney's fees (R. 43). The bank did not appeal, was not party to Buchhalter's appeal, made no appearance in Rude's appeal but was awarded this relief in Buchhalter's appeal. The decree of the District Court is therefore *res judicata* that no expenses or attorney's fees can be recovered by the bank. This is a comparatively minor matter but it serves to emphasize the errors into which the Circuit Court of Appeals fell.

It seems to us that Buchhalter also is precluded from recovering either expenses or attorney's fees for the same reason, i. e., failure to *secure* them in the District Court and failure to *ask* them in the Appellate Court. While he asked the District Court for attorney's fees in behalf of the bank (R. 43), he *never* claimed any in behalf of himself. In addition to the findings of fact prepared by Buchhalter and wherein he asked the District Court for everything to which he claimed to be entitled, Buchhalter also filed below his Motion to Amend Final Decree wherein no mention of expenses or attorney's fees is made (R. 45). The one thing he sought (aside from dismissal of the bill) in the District

and Appellate Courts was Rude's interest in the escrow securities.

In any view of the case Buchhalter should not have been given something which he has never even claimed and upon which no error was assigned and upon which no hearing was ever had.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors complained of, including the violation of the Federal Constitution, may be corrected, and to that end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Tenth Circuit, and finally reverse it.

ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,

ADDITIONAL AUTHORITIES.

In contemplation of law the fees prescribed in the fee bill are full indemnity for the litigation and, while a court of equity has discretion to award, withhold or apportion costs, the *amount* of costs which the Court may award is limited by the statute.

Henkel v. Chicago, St. P. M. & O. R. Co. (Feb. 1932), —— U. S. ——, 76 L. Ed. p. 334. Advance Opinions 1931 Term.

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Bone v. Walsh Const. Co., 235 Fed. 901, cited in the Henkel case.

Doddridge County Oil & Gas Co. v. Smith, 173 Fed. 386.

Whitney v. Jersey Shore Borough, 266 Pa. St. 537.

Smith v. Equitable Trust Co., 215 Pa. St. 413.

Winton's Appeal, 87 Pa. St. 77.

Newton Rubber Works v. De Las Casas, 182 Mass. 436.

Rowland v. Maddock, 183 Mass. 360.

Fuller v. Trustees, 252 Mass. 258.

Conaughty v. Saratoga County Bk., 92 N. Y. 401.

Metropolitan Life Ins. Co. v. Kinsley, 269 Ill. 529.

Constant v. Matteson, 22 Ill. 546.

And the exception whereunder equity compels others to contribute their just portion of the expenses of one who has secured or preserved a common fund for the benefit of all, does not apply where the litigation is adversary throughout.

Winton's Appeal, supra.

Whitney v. Jersey Shore Borough, supra.

Dunlop v. McGehee's Exr., 139 Va. 643, 124 S. E. 199.

Eckford v. Borough of Atlanta, (Ga. 1931), 160 S. E. 773.

The courts of Colorado have consistently and always held that even the legislature has no power

under the state Constitution to enact a law requiring one party to pay another's attorney's fees.

Pacific Life Co. v. Van Fleet, 47 Colo. 401.

Antlers Park Regent Mng. Co. v. Cunningham, 29 Colo. 284.

Campbell v. Los Angeles Gold Mine Co., 28 Colo. 256.

Davidson v. Jennings, 27 Colo. 187.

Perkins v. Boyd, 16 Colo. App. 266.

Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 155.

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Supreme Court of the United States

October Term, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY E. LUTZ,
Counsel for Respondents, Buchhalter, Blount, Silverstein and Rosner.

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STATEMENT.

MAY IT PLEASE THE COURT:

The statement of this case as made in the petition is neither adequate nor sufficiently accurate to inform the Court of the nature of this controversy. We shall endeavor to briefly set it forth.

The petitioner Rude, as plaintiff in the trial court, sought by bill (pages 1-6, R.) a lien upon the escrow in question, for what he claimed was a personal indebtedness of Buchhalter to himself. He alleged that such indebtedness consisted of the balance due (after giving certain credits) on a promissory note bearing date August 29, 1929, in the principal sum of $67,500.00. To gratify this alleged balance, in the purported sum of $59,699.61, he sought the sale of the entire escrow proceeds and a deficiency judgment in the event of inadequacy. The defendant Buchhalter set up in his answer (pages 13-22, R.) vigorous and emphatic denial of any personal obligation to Rude whatsoever and asserted that the note in suit was fictitious and represented no obligation. He alleged, upon the contrary, that the escrow in question belonged to himself and Rude in the proper proportion of their respective investments in the enterprise that gave rise to the escrow involved. The answer of the defendants, Messrs. Blount, Silverstein & Rosner (pages 22-26, R.) was wholly corroborative of the allegations of Buchhalter's answer. These last named parties were made defendants by Rude upon the ground that their attachment (in the State court) of the escrow proceeds was subordinate and inferior to the lien claim of himself (page 5, R.) and that these defendants had full knowledge "of the rights of plaintiff and of all the matters set forth in this bill." Be it noted, in passing, the attachment of Messrs. Blount, Silverstein & Rosner was in aid of an alleged indebtedness for attorneys' fees owed, so it was and is claimed, jointly by Messrs. Rude and Buchhalter to them. All said

rights of lien in Rude, as well as those of the alleged personal indebtedness of Buchhalter to him were likewise denied.

Buchhalter's answer (page 21, R.) specifically set up that Rude's bill was fraudulent in its entirety; that he was in court with unclean hands; that instead of accepting his due and proper proportion of the escrow funds according to his rights and interests, he sought to impose a personal liability on Buchhalter through the medium of a note that never represented an obligation; that he was seeking to employ the writs, processes and functions of a court in equity in order to perpetrate a fraud, not only upon all the defendants, but upon the court as well. Buchhalter prayed (pages 21-22, R.) that Rude's claim of indebtedness and lien be denied; "that said bill be declared to be unconscionable and inequitable; that same be dismissed upon the merits; for costs and for all such other and further relief as in equity and good conscience the facts warrant."

We do not propose to review the evidence. A few vital features, however, so far as they portray or establish the corrupt intent of the plaintiff Rude, will be pointed out.

Long before the institution of Rude's suit, and well known to him, the validity of the title to the property whereon the escrow bonds rested, and all during the pendency of this cause, continued to be involved in litigation in the Supreme Court of Colorado, and hence the bonds were without market and were of wholly problematical value (page 72, R.). This fact served to supply a desire on Rude's part

to inflict, if he could, a personal obligation on Buchhalter so that the latter would bear the sole hazard of that litigation.

Conditions became highly acrimonious between these two and Rude admitted on the witness stand (page 79, R.) that it was his intention to "break" Buchhalter. The evidence further established that prior to the institution of his suit, he had stated to the defendant Rosner (page 99, R.) that he was going to "get" Buchhalter, no matter what it cost him, and that he knew the $67,500.00 note in suit was fictitious. Yet again, and prior to the institution of his said suit, Rude went so far as to write a letter to the wife of the defendant Buchhalter, that unless a settlement "satisfactory" to himself was made, adverse publicity would ensue for the whole family; that they would be "dragged through the mire" (Defendant's Ex. 5, page 229, R.).

Such were the motives and purposes with which this man sought entrance into a court of equity.

Now, respecting the escrow in question and the bonds and funds going to comprise it, let us briefly see the record of Mr. Rude's testimony respecting his connection with it, as well as his interest in it. It is to be here remembered that he now asserts that he is being deprived of property without due process of law. He swore upon his oath that he never owned the property of which he now asserts he is being deprived. Let the record speak (page 72, R):

(Cross-Examination of the Plaintiff Rude.

"Q. These bonds and funds that are over there in the Bank, Mr. Rude, to whom do they belong? A. The bonds?

Q. Yes. A. Mr. Buchhalter.

Q. They all belong to him? A. No, I don't know that they all belong to him. They are held there as security. They belong to me.

* * * * *

Q. Do you claim to own any of the funds or any of the bonds now in escrow in The First National Bank and now in suit? A. I own them all. I claim them as security of my note."

But the fact of Buchhalter's ownership of the escrow, subject only to Mr. Rude's lien, did not rest alone upon Rude's testimony. His counsel, Mr. Morris, in open court conceded title to be in Buchhalter. (See page 187 of the Record for the following):

"*The Court to Mr. Morris:* You don't claim any title to the bonds, do you?

Mr. Morris: We claim that the bonds are held as security for the amount Mr. Buchhalter promised to pay.

The Court: Where is the title? There must be a title somewhere, not floating around in the air. In other words, if you claim a lien against a piece of property, that is an admission that some one else holds the legal title.

Mr. Morris: I think that, subject to the lien, Mr. Buchhalter had the legal title to the bonds."

Respecting the note (page 37, Brief), which Mr. Rude mentioned in his testimony last above, and which counsel now assure us is not in suit, Mr. Rude has this to say (page 76, R.):

> "Q. And this note was a valid note from the time given up until now? A. Yes, sir.
>
> Q. That is your contention? A. Yes, sir."

Such, may it please the Court, in perhaps scant, but none the less indicative outline, was and is the nature of this cause.

The trial court dismissed Rude's bill on the merits, in effect, saying his testimony (page 262, R.) was incredible. That court, and apropos of no issue raised by Rude, and in the face of his denial of ownership of any part of the escrow proceeds, other than as security for his note, made the finding that, as of date August 16, 1929, these parties' investment in the enterprise (not in the escrow) was as $61,000.00 for Rude and $53,992.00 for Buchhalter, and there the cause rested so far as the trial court was concerned.

Cross-appeals were taken. It was Buchhalter's contention that Rude ought to be taken at his sworn word respecting ownership of the escrow—this oath fortified, as we have seen, by his counsel's concession respecting the legal title thereto; that Rude had sought to perpetrate a gross fraud in the manner set up in the answers; that he was in a court of equity with unlcean hands and that under the facts obtaining, that doctrine ought to find strict application; that

the escrow should be dissolved; that the mere fact that property was in a third person's hands could not serve to enlarge the rights of an unclean plaintiff, and that under equitable principles, Rude should have been remitted to such remedy at law as he might be advised.

Rude in his appeal renewed all of his contentions below. He sought a personal judgment, a lien on the escrow, its sale, etc., bringing forth also a few additional contentions, apparently for good measure. As remarked by Judge McDermott in his opinion denying the petition for rehearing (page 304, R.), five pages of Rude's brief were devoted to argument that equity, having jurisdiction, ought to wind the matter up by ordering an accounting or in such other fashion as might fit the case.

Hence the Court of Appeals, taking Rude at his word in that respect, undertook to finally adjudicate the controversy on the ground, among others, so it said (page 275, R.) that the public be not put to the expense of another trial. "The facts are before us and we have concluded that this Court of Equity having taken hold of the matter, should wind it up."

It was thereupon concluded by the Court of Appeals, and notwithstanding Rude's sworn statement that Buchhalter owned the escrow, and notwithstanding also counsel's concession of legal title in Buchhalter, subject only to Rude's alleged right of lien, that (page 275, R.), "the fact is that Rude and Buchhalter own these securities jointly." Thus, by virtue of that finding, and that finding alone, and in opposition to Rude's whole hypothesis and theory of suit,

does he become vested with an interest in the escrow that we are now told he is deprived of without due process of law. But in arriving at that conclusion respecting the ownership of the escrow, the Court of Appeals further said (page 275, R.):

> "If this were the ordinary case of a claim being honestly but mistakenly asserted, such a decree should be entered, Rude paying the costs of the case. But we are convinced that Rude's claim was not put forth in good faith and that his testimony is materially false. Equity abhors a forfeiture, and, unconscionable as Rude's conduct is, we are not at liberty to forfeit his property, particularly to one whose conduct is not irreproachable. But equity should right the wrong as near as may be. Rude has put Buchhalter and the Bank to the expense of defending a claim conceived in bad faith. Any decree should therefore be so conditioned as to impress upon Rude's share of the securities, a lien in favor of Buchhalter and the Bank for the expenses to which they have been put by the assertion of this groundless claim, the amount thereof to be determined by the trial court."

In summary, then, of the facts: This man Rude, in his efforts to "break" and "get" Buchhalter and to drag the latter and his family "through the mire," as he expressed it (see references *supra*), fraudulently sought to impose upon Buchhalter a personal liability for a large amount, and in order to effectuate that end, was willing to and did disclaim

interest in the subject-matter of the escrow, other than by way of lien, and sought, as well, to similarly defraud all of the other defendants in the cause, through the instrumentality of a court of equity. But notwithstanding all this, and much more not here adverted to, the Court of Appeals, none the less, awarded him his actual interest in the escrow (solely on defense pleadings and evidence), imposing the equitable requirement that he hold the defendants Buchhalter and the Bank harmless from, not their damages, but their actual outlay.

We now address ourselves, with what brevity we may, to the petition for certiorari. It is believed that the opinion of Judge McDermott (pages 303-307, R) denying the motion for rehearing, is a complete and unimpeachable answer to the several points raised. This Honorable Court's perusal of that opinion in its entirety is respectfully requested. We shall refrain from repeating his argument or any of it. We content ourselves with a few general observations.

"POINT A."

(Page 15, Petitioner's Brief)

It is here asserted that Rude has been deprived of property without due process.

The facts are incontrovertible that instead of having been deprived of property, he was awarded it. The adage that "There is nothing new under the sun," must give way in this case. It is new—brand new—for one to contend that when he has been given his actual rights and actual property interests, in the face of his corrupt disclaimer, that he is deprived of

property without process because equity has been exacted of him. It was well within the power of the Court of Appeals—nay, almost on the border line of requirement, in view of Rude's unconscionable conduct, his deliberately fraudulent hypothesis in seeking recovery upon a fictitious instrument—to have dissolved the escrow and remitted him to his action, if any, at law. Had the Court of Appeals seen fit to go so far and thus deprive Rude of his entire interest in the escrow, there would be no room for the contention that he was deprived thereof without process. Because the Court saw fit to overlook his malign purposes and his "materially false" testimony, to look through the shadow, dark as it was, into the substance and to award him his corruptly disclaimed interest, conditioned that he at least to some extent make amends, leaves less room for that now grotesque contention.

Rude sought the Court of Appeals' adjudication. Any condition imposed was necessarily invited. The record was before the Court. It spoke for itself. To have granted a hearing upon the conditions imposed, as is now contended should have been done, would have been nothing other than the equivalent of granting a new trial or a new opportunity for Rude to explain his "unconscionable conduct." Such a procedure as that now contended for would have been, indeed, extraordinary. There can be and is no suggestion that the case was not fully tried; that the record was incomplete, or that Rude did not have his day in court upon the merits. We shall not further discuss this matter.

State statutes allowing the recovery of attorney's fees in special classes of actions have been repeatedly upheld as against constitutional objection.

Farmers and Merchants Insurance Co. v. Dabney, 189 U. S. 301.

Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412;

Chicago & Northwestern Ry. Co. v. Nye, etc., Co., 260 U. S. 35;

Fidelity Mutual Life Association v. Metler, 185 U. S. 308, *et seq.*

It would constitute an anomaly if courts may not exact equity in the form of an attorney's fees allowance without running counter to constitutional inhibition.

"POINT B."

(Page 18, Petitioner's Brief)

"The award of fees and expenses is contrary to principle and precedent," so it is said.

The law on this matter is fully covered by Judge McDermott's discussion. We add only a comment. Whatever the rule may be, as applied to honest though mistaken litigants, it can have no relationship to the extraordinary facts of this case. Whatever the rule may be as respects merely vexatious litigants, it is still without applicability here. Whatever the rule may be as applied to litigants who allege in pleading, fraud and scandal against their adversaries, even that can have no applicability here. The instant case presents a spectacle of an intended abuse of the writs and functions of a court of equity in aid, as we confidently assert the record discloses, of what was in-

tended by Rude to be a wholly fraudulent cause of action in the effort to break and destroy his adversary, along with the gratification of inordinate cupidity. Hence it is that we do not stop to review or distinguish the numerous cases referred to by our opponents under this heading. But much of this discussion would seem to be somewhat besides the question. The controversy in the instant case is not so much whether attorneys' fees, as such, are allowable to an adversary. That would seem to be incidental. The question is whether a court of equity may not require, as a condition to requested relief, a corrupt and fraudulent plaintiff, on his part, to do equity to wronged adversaries, and this, irrespective whether that equity consists of reimbursement for outlay or some other suitable requirement.

The equity in this case directed to be performed by the Court of Appeals was and is that the petitioner, Rude, reimburse the respondents Buchhalter and the Bank for their outlay in combating for a period of approximately two years, what was found by the Court to be a groundless and unconscionable claim. There is no element, there is no aspect, of damage award. The respondent Buchhalter is not indemnified for the two and more years' loss of the use of his share of the escrow. He and the Bank are merely held whole from the outlay occasioned by an attempted fraud sought to be effectuated through the instrumentality of a court of equity. It requires neither argument, we take it, nor yet the citation of authority, that a court of equity may impose conditions upon requested relief. Such has been the immemorial practice. The contention of the peti-

tioner, under the guise of a clamor against attorneys' fees, resolves itself, in effect, into the assertion that he should not have been made to do equity—in short, that he should be invested, scot-free, with that which he falsely swore he did not own, and which his counsel conceded belonged to Buchhalter, subject only to a right of lien. If the petitioner, Rude, be correct in his contention, then a court of equity subsides into a mere instrumentality of a corrupt and fraudulent litigant.

"POINT C."

(Pages 32-34, Brief of Petitioner)

Under this heading it is stated that "The doctrine that a court of equity may grant relief only upon conditions, is inapplicable."

If this assertion constituted argument or had any relationship to the facts as they exist in this cause, it would receive attention. We have hereinabove noted the salient facts and the unprecedented nature of the controversy. Hence the utter fallacy of the postulate becomes apparent.

To characterize the requirement, as has been done, that a corrupt suitor appealing to a court for relief, and by which he becomes invested with property, the ownership of which he disclaimed, should hold his adversary harmless from outlay, as arbitrary, strikes the writer as bordering on the facetious.

Under Section 2 of the heading last noted (pages 33-34, Brief), it is said that conditions should not be absolute; that "the party should have his option to

reject the whole decree." This is ordinarily true and is frequently, though not invariably done. In the instant case, however, the petitioner Rude never asked or sought from the Court of Appeals an alternative. Hence, we take it, he is now foreclosed against that contention. Had Rude desired an alternative, it would have been an easy matter to have requested the Honorable Court of Appeals to afford it to him. A half dozen lines additional would have sufficed. The only possible alternative afforded by the nature of the case would be to dissolve the escrow in Buchalter's favor, subject to the rights of the other parties, and remit Rude to such action at law as he may be advised he possesses. But Mr. Rude did not desire the alternative and made no request therefor.

It is stated (near the top of page 34, Brief) that "Petitioner Rude owns over one-half thereof" (referring to the $90,000.00 par value of bonds in escrow). We make no charge that our opponents in any manner seek to mislead this Honorable Court, but nowhere in their petition or brief have they informed it that whatever Mr. Rude may own in the escrow came to him by way of express award of the Honorable Court of Appeals, and such award in the face of his sworn assertion that he had no ownership whatsoever therein; that his interests were confined to lien rights only. That single and incontrovertible fact dissipates his every contention here.

"POINT D."

(Page 35, Petitioner's Brief)

It is here said that the Court of Appeals "erred in holding that petitioner had not brought his suit in good faith."

This simply raises a question of fact under the record. The only inquiry possible would be whether there was sufficient evidence to sustain the finding. The limited portion of the evidence that we have seen fit to hereinbefore present to this Honorable Court demonstrates beyond cavil, captious or otherwise, that any contrary ruling would have been a travesty. The inquiry ends.

"POINT E."

(Pages 37-39, Petitioner's Brief)

It is here asserted that the Court of Appeals erred in holding that, "It was the assertion of the false and groundless claim that prevented a distribution of the fund without the aid of equity."

This contention falls within the exact category as that noted last above. But some of the purported statements of fact are so divergent from those actually obtaining, that we undertake a correction. In the first place, it is stated (page 37, Brief) that the Court's holding is contrary to the evidence. This is emphatically disputed in its entirety.

It is next asserted that "Both the District Court and the Circuit Court of Appeals held that the funds and bonds in escrow are owned by Rude and Buchhalter in the proportion that $61,000.00 bears to $53,922.00."

The District Court absolutely held no such thing. Its holding was (bottom of page 43 and top page 44, R.): "That plaintiff (Rude) and defendant Buchhalter were interested in the properties theretofore belonging to the Colorado Pulp and Paper Company and that on August 16, A. D. 1929, plaintiff's investment in said properties was $61,000.00 in principal and that of defendant Buchhalter was $53,922.00."

The escrow did not arise until November, 1929. Rude's suit has as its basis the alleged balance due on a note for $67,500.00, dated August 29, 1929, and we have seen again and again that Rude swore that he had no interest whatsoever, by way of ownership, in the escrow, and the finding of the District Court had no relationship whatsoever to that matter.

It may be well at this juncture to invite the attention of the Court to Mr. Rude's bill. The prayer thereof (pages 5-6, R.) in itself shows that his only claimed interest was not by way of ownership, but by way of lien. For convenience sake we here set it forth. It reads:

> "Wherefore, plaintiff prays that his said lien be adjudged and declared a first and prior lien on all assets held in said escrow and that said bonds hereinbefore described, held in escrow by said defendant Bank, be sold to satisfy said lien and that said Bank be directed to pay over to said plaintiff all cash held by it in said escrow and the proceeds realized from the sale of said bonds, not in excess of $59,699.61 and accrued interest from November 18, 1929, at the rate of eight per cent per

annum; and for judgment against defendant Buchhalter in the sum of $59,699.61, together with interest at the rate of eight per cent per annum from November 18, 1929; and that all sums paid from said escrow, both in cash now in hand and the proceeds of the sale of said bonds, be credited on said judgment; and for such other and further relief as to the court may seem just."

We are assured, in italics, on page 37 of petitioner's brief, that Rude's "suit was not on the note. The note was set out merely by way of background and was, at most, a collateral matter."

In passing, let us look also into the accuracy of this statement. On page 2, Record, paragraph 2 of Rude's bill, he states receipt by himself of the promissory note of Joseph Buchhalter for the sum of $67,500.00, alleging also a further sum due him from Buchhalter, of $7,500.00. He tells us (Paragraph V, page 3, Record): "On or about the 18th day of November, 1929, plaintiff, I. Rude, and Joseph Buchhalter entered into an oral agreement at The First National Bank of Denver, whereby its was agreed that said I. Rude would be paid at once by said Joseph Buchhalter the full amount of his note and accrued interest, in cash, in the sum of $67,500.00 plus accrued interest, together with $7,500.00," etc., etc.

Now, for what does he sue? He sues for the sum of $59,699.61. The total amount claimed was $75,000.00. He pleads a credit of $16,365.34. That sum deducted from $75,000.00, which is comprised, in turn, of the $67,500.00 note and the $7,500.00 item, less

the credit received, equals exactly $59,699.61. Yet counsel blandly inform us that the note was, "at most, a collateral matter."

To return to the statement that the District Court held Rude "owned" the escrow in the proportion designated: The District Court refused to adjudicate the controversy and merely found respective investments of the parties in their preceding enterprise. Now, the Court of Appeals did find as stated. That Court did award to Rude a proportionate ownership in the escrow, in face of his denial, in face of the fact that he sought only a lien, in face of the fact that he swore to Buchhalter's ownership, and in face of his counsel's concession that legal title was in Buchhalter.

It is next stated (top of page 38, Brief): "The documentary evidence conclusively supports such holdings" (Ex. B, page 196, R.). This will be found to be a letter signed by both Rude and Buchhalter, as of date August 16, 1929, stating not their interests in the escrow, which had not then nor for long thereafter come into life, but stating, as the District Court found (basing it on this letter), what their interests in their preceding enterprises were.

These matters can scarcely be of consequence to this Honorable Court in the present proceeding. But for the sake of common accuracy we cannot let them pass unchallenged.

Some aspersion (page 38, Brief) is attempted to be cast on Buchhalter because he contended below that subsequent to August 16, 1929, the date of the

District Court's finding and the date of the exhibit referred to, he had invested the further sum of $4,500.00. This was testified to not only by Buchhalter, but also by the witness Block (page 117, R.), the latter stating also that Rude agreed thereto; and respecting this matter, our opponents said (on page 35 of their Brief for Rude, as filed in the Court of Appeals): "If Buchhalter actually invested other money after that date (August 16, 1929) he can easily establish the exact amount by competent evidence when the occasion arises." Now, we are gratuitously told that Buchhalter has sought a greater than just share of the escrow proceeds.

Let it be noted, and noted well, that save for Buchhalter's pleadings and evidence, neither court below would have ever known that Rude ever had any interest by way of ownership in the escrow, and save for Buchhalter's pleadings and his evidence, Rude would never have been awarded any interest therein by the Court of Appeals.

It is next asserted (page 38, Brief): "In the Circuit Court of Appeals, Rude asked the funds and bonds be distributed between him and Buchhalter. Buchhalter resisted this."

It is true that Rude, notwithstanding that his whole suit below was to establish a lien as against Buchhalter, using as the basis therefor a fictitious instrument and resorting to all his attendant denials of ownership in the escrow, did ask the Court of Appeals to distribute the funds and bonds of the escrow to himself and his adversary. He did not ask it on the strength of even so much as a single

word of either allegation or testimony of his own. He brazenly asked it in the face of his own sworn contrary hypothesis. He asked it on the basis of the admissions of Buchhalter's answer. And Buchhalter did resist it, solely on the grounds alleged in his answer, and established by overwhelming proof, that Rude's entire suit was fraudulent and fictitious, and that in consequence, he should be remitted to his remedies, if any, at law.

As repeatedly noted, the Court of Appeals acceded to Rude's request, ordered an accounting and fastened upon him the requirement that he do at least partial equity.

What particular variety of assurance counsel possess, we need not inquire. But in face of the pleadings and the indisputable facts of this case, we are next informed that (page 38, Brief) "accordingly it was never possible for Rude to obtain his just proportion without resort to equity. An accounting has always been and still is necessary."

If such be true, why did they go into court on the sworn hypothesis that Rude never owned any proportion, "just" or otherwise; that his were lien rights only—and if an accounting had "always been necessary," why did they not institute such a suit in the first instance instead of the unconscionable one to which resort was had? Save for Buchhalter's pleadings and evidence, as we have had occasion so many times to repeat, Rude would not even now have any interest, "proportionate" or otherwise, in the escrow —that award to him, which he now so eagerly and avidly claims was bestowed upon him, his disclaimer

notwithstanding. But the question is, was the Court of Appeals right in saying that Rude's groundless and false assertions of claim prevented a distribution of the funds without the aid of equity? Can this Honorable Court think otherwise on this record?

"POINT F."

(Pages 39-41, Brief of Petitioner)

It is here contended that Buchhalter's appeal should have been dismissed on the grounds: First, that "indispensable parties were omitted." This is wholly fallacious and untenable. The Bank procured all the relief it sought, to-wit, dismissal at Rude's costs, save that it did not receive, as requested, advice what to do with the escrow. It was destitute of interest save as to who owned the escrow. Buchhalter's appeal was calculated to settle that question as between himself and Rude. Besides that, Buchhalter's appeal was taken solely from the trial court's refusal to enter the tendered findings of fact and conclusions of law. An appeal of such nature operates not on the parties directly. It operates instead, directly upon the court below, before whom all the parties were. Had the District Court refused to make any findings whatever, the remedy would clearly have been by mandamus and none of the parties would have been before the Appellate Court save the party applying for the writ. An appeal from incomplete and inadequate findings of necessity operates in that identical way. Buchhalter's appeal was to require the court below to establish his rights as against Rude, and as against Rude alone. The Bank did not see fit to pursue its inquiry for instructions and there

was no reason why Buchhalter should attempt to require it to do so. An ascertainment of who owned the escrow put a period to the Bank's solicitude Buchhalter's appeal was to accomplish, if possible, his protection from future litigation at the hands of Rude and an ascertainment as to the disposition of the escrow. But Rude, on his appeal, made not only the Bank a party, but all other defendants as well, and their present contention resolves itself into nothing other than a specious claim that parties are before a court not for all purposes within the confines of the issues, but only for such purposes of their own selection as the party may designate. We cannot refrain from an expression of astonishment that such matters are presented in apparent seriousness to the Supreme Court of the United States.

It quite departs rational discussion, so it seems to us at least, to say, as is said here, that the Court of Appeals was without jurisdiction to make a disposition of the property in question. As before noted, both Buchhalter and Rude appealed. The former made Rude a party alone. The latter made every one before the trial court a party. Jurisdiction was doubly conferred. Rude sought his accounting relief not in the trial court, but before the Court of Appeals. He got it, but not in the manner that he wished. The parties were not only before the court, but two of them were doubly before it, and now because something was or was not done in one appeal as distinguished from the other, jurisdiction was lacking, so it is said. Such, if your Honors please, is the chief contention under "Point F."

We must notice, however, another incorrect assertion. On page 40 of the Brief, it is said: "The other defendants, Blount, Silverstein and Rosner, have an attachment lien upon these same funds and bonds. They likewise were not made parties to Buchhalter's appeal." So much is true. Messrs. Blount, Silverstein and Rosner were represented by the same counsel as Buchhalter, as they are here. They procured all and singular the relief they sought in the trial court, to-wit, dismissal with costs. Such, necessarily, left their attachment intact, free from interference. They were destitute of interest as to who, as between Rude and Buchhalter, owned the escrow in question. They had an attachment lien, whosoever owned it or was declared to own it. Had they joined Buchhalter's appeal they would unquestionably have been dismissed out of the case for sheer want of litigious interest. Rude, of course, had to make them parties because he went before the Court of Appeals still contending that his "lien" was paramount to theirs.

But we are next informed (page 40, Brief): "But Buchhalter, one of the defendants in the attachment suit, sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him." If that be true, then the record speaks falsely (pages 42-43, Brief), setting forth the requested findings of fact in Buchhalter's behalf which were rejected by the trial court, and from which appeal was taken. The finding referred to reads, in part:

> "5. That the defendant, The First National Bank, having prayed instructions as to

> the disposition of said escrow funds and bonds, it is hereby directed to turn all and singular the same over to said defendant Buchhalter, subject * * * to any order of the State court respecting the claim of the defendants, Blount, Silverstein and Rosner."

Such is the manner, if your Honors please, in which Buchhalter "sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him." And such, also, disposes of the statement made (page 39, Brief), that the Court of Appeals could not order disobedience to the process of the State court. The rights sought were made expressly subject to the process of the State court.

We decline to notice the remainder of the discussion under this heading to the effect that Buchhalter's appeal was frivolous, other than to so characterize the argument itself on that score.

The whole contention under this heading may be disposed of by a holding of the Circuit Court of Appeals of the Tenth Circuit itself. As noted, there were double appeals. The record was doubly before the Court:

> "An appeal in equity brings up the entire record and the Court of Appeals has full power to make and enter its own decree in the cause."
>
> *Swift v. Jackson* (10 C. C. A.), 37 Fed. (2d) 237-240.

The petitioner apparently would wish it otherwise.

"POINT G."

(Page 42, Brief of Petitioner)

It is here contended that the Court of Appeals should not have awarded the Bank its expenses and attorney's fees. The reasons assigned are that the District Court "expressly refused the Bank attorney's fees. The Bank did not appeal, was not a party to Buchhalter's appeal, made no appearance in Rude's appeal, but was awarded this relief in Buchhalter's appeal."

In the first place, the Bank never directly requested that the District Court allow it fees. Such a request was included in Buchhalter's tendered and rejected findings of fact (page 43, R.). It is true, the Bank concurred in those tendered findings, but it did not individually request fees any more than it individually requested that Rude be turned out of court because of his unclean hands and the various other matters going to comprise the requested findings. Buchhalter, as noted, appealed from all rejected findings, of which fees for the Bank was only one item. And it seems now to be asserted that the Bank, though by Rude, himself, made a party to his appeal, is to be regarded as not having been a party because it entered no appearance and filed no brief. If that position be correct, indeed a method partaking of simplicity itself has been newly discovered, whereby one may defeat the jurisdiction of a court, either appellate or of first instance. A disregard of process is all that is necessary. The Bank was, of course, before the Court. Its answer requesting instructions was before the Court. Buchhalter's appeal

from the District Court's refusal to award the Bank fees was before the Court. The Court's inherent power to enter it own decree dissipates every contention made by petitioner under this heading. Besides that, as noted, Rude himself urged the Court of Appeals to dispose of the controversy.

CONCLUSION.

This is simply a fact case, resolved (on the defendant's showing) by the Court of Appeals in favor of petitioner, contrary to his sworn pleadings and testimony, so far as interest in the escrow is concerned. He now boldly asserts that he is a proportionate owner of the bonds, notwithstanding his oaths and his counsel's concession to the contrary. He insists that his once corruptly disclaimed interest must be awarded him free from either castigation or condition. All and singular the questions raised by the petition in this case are purely academic so far as Rude is concerned. He is in no position to raise them, even assuming they were of substance, which they are not. Had he set out in the first instance to claim his now asserted proportionate interest, however unnecessarily or vexatiously, it is true that in such case equity would make no exactions of him in manner and form as the Court of Appeals has decreed. But according to the findings, his testimony was "materially false;" his suit was "conceived in bad faith;" his claims were "groundless;" his conduct "unconscionable." He requested the Court of Appeals to give him relief, not on his own theory or his own testimony, but on the hypothesis of the defense pleaded and established by Buchhalter. He requested.

amongst other things, an accounting and he procured more than his rights, under the circumstances. He complains of a decree of the Court of Appeals giving him property as a matter of grace, not as a matter of right, under the circumstances. That the Court was not sufficiently gracious constitutes, in effect, the burden of his entire petition. He says he has been deprived of property without due process. He fails to note that had the Court of Appeals not awarded him his interest, in the face of his corrupt conduct, he would, so far as this litigation goes, have no property concerning which he could raise that claim. He would, instead, be merely possessed of such action at law, if any, as he could devise. In view of the record in this cause, that would be not only nebulous, but hazardous in the extreme.

It is time that an end be put to this controversy It has at all times been worse than vexatious. It has become intolerable. Certiorari should be denied.

Very respectfully submitted,

HENRY E. LUTZ,

Counsel for Buchhalter, Blount, Silverstein and Rosner, Respondents.

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FILE COPY

Supreme Court of the United States

October Term, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENTS.

HENRY E. LUTZ,
Counsel for Respondents, Buchhalter, Blount, Silverstein and Rosner.

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SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENTS.

SECTION I.

Discussion of Right of Court to Award Attorney's Fees In View of "Fee Bill" Enactment.

MAY IT PLEASE THE COURT:

The Court of Appeals did no more in this cause than to apply to its extraordinary facts that cardinal

and venerable maxim that, "He who seeks equity must do equity."

In our short brief in opposition to certiorari, the nature of this cause was outlined. The sketch will hereinafter be filled in to a full length portrait. For the purpose, however, of immediate discussion, we find the petitioner, notwithstanding his sworn disclaimer of interest in the escrow in question (other than by way of lien), and notwithstanding also his counsel's concession that legal title to said escrow rested in respondent Buchhalter, none the less sought the aid of the Court of Appeals in bringing about a distribution of the proceeds of the escrow, on the basis of joint ownership. The petitioner states on page 38 of his brief in support of certiorari:

> "In the Circuit Court of Appeals Rude asked that the funds and bonds be distributed between him and Buchhalter."

As we have seen, the Court of Appeals characterized the petitioner's suit as "groundless", "unconscionable", "as conceived in bad faith" and that his testimony was "materially false" (page 275, transcript).

In other words, and notwithstanding Rude's corrupt and fraudulent conduct, the court undertook, on his urgent plea, to accord him his proportionate share of the escrow proceeds—not as a legitimate suitor seeking an adjudication as a matter of right, but as a false and corrupt litigant who should be required to make amends for perfidious misconduct. He was given an accounting as a mat-

ter of pure grace, and the requirement exacted that he hold certain of his adversaries harmless from their outlay occasioned solely by himself.

But Rude is not content. He now insists the Court of Appeals should hold him immune from the operation of the time-honored maxim above set out. It is well within the purview of the facts to say that he sought to utilize the District Court as an instrument to effectuate a gross fraud. He supplicated the Court of Appeals to believe the allegations of Buchhalter's answer that he (Rude) was, in truth and in fact, a proportionate owner of the escrow and that his own contrary oaths and allegations should be disregarded and condoned and now asserts that no equities may be exacted of him. He says that because the equity in question took the form of an attorney's fee allowance, that it is anathema and under the ban of the so-called "Fee Bill" Statute (U. S. C. A. Title 28, Secs. 571-572).

It is submitted that the fee bill and cost enactment has never been construed to interfere with the free exercise of either accepted jurisprudence or practice in equity. This matter has long since ceased to rest upon either speculation or conjecture. This Court held in

Trustees v. Greenough, 105 U. S. 527-538:

> "The Fee Bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity,

in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require."

The case of *Guardian Trust Co., et al., v. Kansas City Southern Ry. Co.* (8 C. C. A.), 28 Fed. (2nd) 233, is, unless it be now overthrown, persuasive authority for the action of the Court of Appeals in the case at bar.

After an elaborate discussion of the power of Federal Courts, as distinguished from mere policy in such cases, and conceding that special facts are requisite for its proper exercise, the Court said (p. 244):

> "We think it may be safely stated, however, that whenever there have come before Federal courts of equity, cases in which special facts showed that, in accordance with well established principles of right and equity, costs 'as between solicitor and client' ought to be allowed, the courts have not refused to make such allowance.
>
> "The most common classes of cases, though by no means exclusive, in which such cost allowances have been made in equity, are:
>
> "Foreclosures of mortgages (citing cases);
>
> "Receiverships (citing cases);
>
> "Suits by stockholders to preserve the property rights of their corporation (citing cases);
>
> "Suits by one or more creditors to preserve and bring into court for admin-

> istration a fund in which they are interested (citing cases);
>
> "Certain classes of proceedings in connection with bankruptcy matters (citing cases).
>
> "Closely akin to the foregoing classes of cases are those involving allowances made to a pledgee for expenses and attorney's fees in preserving and defending the pledged property." (Citing text authority and cases.)

The court then goes on to give still further illustrations, and holds (p. 245) that in a proper case it is not even necessary that there be a fund in court out of which such allowance is ordered paid.

In the case at bar, the respondent Buchhalter has long been deprived of the use of his share of the escrow by the institution of the petitioner Rude's groundless and fraudulent claim of lien. This is closely analogous to seizure by the wrongful appointment of a receiver. It is analogous also to injunction or attachment without bond. In receivership cases, petitioners are charged with all costs and expenses when their application has developed to be baseless or unfounded.

See: *Beach v. Macon Grocery Co.*, 125 Fed. 513 (C. C. A. 5), where the Court said (p. 517):

> "The property having been taken from the defendants against their consent under an erroneous order which they resisted successfully in an appellate court, the only proper course is to return the property without charge of any kind against it or against the

> successful defendants. The defendants should be put in their former condition as nearly as possible, instead of any sum being taxed against the defendants. Under such circumstances they would be entitled in some jurisdictions to recover damages in a proper cause for being deprived of the use of their property. The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs and expenses incurred by their wrongful application."

Attorney's fees, as such, do not seem to be specifically mentioned in this case, but assuredly the principle is broad enough to embrace them. We do not multiply authorities on the general subject. They are legion.

We have seen, as specified by the court in the *Guardian Trust Co.* case, *supra*, there are at least six, if not more, established and recognized classes of cases where attorney's fees and expenses are allowed, notwithstanding the fee bill statute or any other enactment.

It was said *In Re Schocket*, 177 Fed. 583, by District Judge Brown (p. 584):

> "A court of equity, in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs."

This court granted certiorari in the *Guardian Trust Company* case *supra*. Its opinion is found in 281 U. S. 1, and the question of attorney's fees was there left open so far as commitment by this court was concerned. But subsequently thereto, and in the case of

United States v. Equitable Trust Co. of N. Y., 283 U. S. 738,

this court, without question of any sort, whether arising under the fee bill statute or as a matter of general equity jurisdiction, awarded the sum of $50,000.00 attorney's fees (reducing the amount from $100,000.00 allowed by the Court of Appeals) and sanctioned the following statement of the law:

> Syll: "A trust fund recovered or preserved through the intervention of courts of equity may ordinarily be charged with costs and expenses, including reasonable attorney's fees, incurred in that behalf," etc., etc.

It is true that this decision perhaps adds nothing, or at least has not extended the scope of the holding in *Trustees v. Greenough, supra*, this latter case expressly deciding that the fee bill statute is inapplicable in such instances.

Certain it is that whatever notions may be entertained as respects other classes of cases, this court is definitely committed to attorney's fee allowances in cases of "recovery or preservation" in equity, of a trust fund.

To return briefly to the *Guardian Trust Company* case (281 U. S. 1, *supra*). The question there

resolved was chiefly the construction of a prior mandate of this court. The language of the decree read (p. 9):

> "The decree here affirmed required the 'taxation of costs * * * under the principles, rules and practice in equity.' It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation."

Hence it was held that by virtue of the language of the mandate, costs as between solicitor and client were not there included. But this court also further said (p. 9):

> "In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. * * * Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include (p. 10) therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs should be clearly expressed in the decree."

Although leaving the question of attorney's fees in excess of the amount prescribed by statute open, we have just seen that this court approved a $50,000 attorney's fee allowance in a subsequent case. We

take it, therefore, that at least one exception to the statute stands approved, even though in the some half dozen remaining classes of cases in which such practice has been followed, as pointed out by the Court of Appeals in the *Guardian Trust Company* case (28 Fed. (2nd) 233, *supra*), there has been no definite commitment by this court with respect to those classes. Be it said that the instances are so numerous, the practice so long continued, that the principle of allowing costs as between solicitor and client under special facts, is so deeply imbedded in the equitable jurisprudence of the United States, that it would be at this late day almost revolutionary to eradicate it. It would overturn the established practice in foreclosures, receiverships, certain suits for creditors and stockholders, certain bankruptcy proceedings, as it has been long pursued. Cogent reasons must necessarily exist to authorize such a result. The fee bill statute is either to be construed as an intended limitation upon the inherent powers of courts of equity and enforced accordingly in all classes of cases, or it is not to have attributed to it such an effect in any instance. The statute itself makes no exceptions. The single exception of "recovery or preservation" of a trust fund—if that is to be the only permitted exception—can rest upon neither logic, principle nor statutory language.

Let us come back to the case at bar. As previously pointed out, Rude himself sought equity in the Court of Appeals on a hypothesis completely departing that sought to be utilized by him in the trial court. The Court of Appeals did no more, no less, under the special facts, than to exact what it con-

ceived to be equity from him who sought it. The expenses to which he had unconscionably put his adversaries must be met, and that, out of the escrow in the constructive custody of the court. We find, it is true, no illustrative case under parallel facts invoking the maxim of doing equity in such an instance. There is, indeed, no case of even similar facts, as will become apparent from the discussion of them hereinafter to be made. But similar facts or not, equitable principles are immutable. No identity of facts is required to enforce any equitable maxim. If the Court of Appeals was without jurisdiction in the present instance to exact equity of Rude in the manner stated, then it can only be because the fee bill statute be given the interpretation of operating to destroy its power in such behalf. A Federal court of equity may become of limited functions indeed if such construction be now adopted. In the case at bar, for instance, the court would sink to the low estate of becoming a helpless instrumentality or the mere cat's paw of a litigant found to have been unconscionable in his claims. Besides that, if the recovery or preservation of trust funds be the only permissible exception to the operation of the statute, a very considerable proportion of equity procedure will fall by the wayside, so far as the Federal courts are concerned.

We respectfully submit such far reaching and grave consequences are not to ensue at the instance of one asserting "groundless claims". The equity required to be done in this case—reimbursement for outlay—was not taxed as costs. It does not take the form of personal judgment. It is not collectible

by execution. It is merely a charge on the corpus of the property in the constructive custody of the court.

State Statutes Allowing Attorney's Fees are Enforced in the Federal Courts, and No Conflict Has Been Found with the Fee Bill Statute.

Various state statutes allowing recovery of attorney's fees notwithstanding both constitutional objections and the fee bill enactment, have been repeatedly enforced in the Federal courts. (See *Sioux Co. v. National Surety Co.*, 276 U. S. 238, and the cases there cited.) Speaking of this case, this court said (Feb. 15, 1932) in *Henkel v. Chicago, etc., R. Co.*, 284 U. S. ——, 76 L. Ed. p. 334, No. 7 U. S. Supreme Court Advance Opinions:

> "A Nebraska statute provided that in specified classes of cases, including that before the court, the plaintiff on obtaining judgment should be allowed a reasonable sum as an attorney's fee. The requirement was mandatory. This court held that in such a case the attorney's fee was recoverable in the Federal court, but was careful to point out that the amount was 'not costs in the ordinary sense' and hence was 'not within the field of costs litigation covered by the Federal statutes."

See also, *Dohany v. Rogers*, 281 U. S. 362-370.

Unless the Federal statute be given the interpretation that it was an intended restriction upon the inherent power of courts of equity in exacting justice of their suitors, then we assert, it has no

applicability here. If the statute was intended as such a curtailment of power, then no court of equity has a right to award counsel fees either in cases of preservation of trust funds or in other cases. All would be equally under the ban unless anomalies are to be set up and irreconcilable doctrines are to find countenance. It is submitted the Federal statute relating to costs and attorney's fees has no more relationship to the maxim that "He who seeks equity must do equity," than it has to cases involving the recovery or preservation of trust funds or to any other instance of long established and generally accepted equity jurisprudence.

It is respectfully suggested that the doctrine announced by this court in *Ohio Ex Rel Popovici v. Agler*, 280 U. S. 379, 384, can well find application to the instant case. That case involved a construction of Article III, Section 2 of the Constitution relating to the jurisdiction of the courts of the United States—whether a State Court had jurisdiction of a divorce action instituted against a foreign consul. This court said, speaking of that constitutional provision (p. 383):

> "The language, so far as it affects the present case, is pretty sweeping, but like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

SECTION II.

Review of the Pleadings, the Evidence and a Discussion of the Unclean Hands Doctrine.

It was our earnest insistence in the trial court and in the Circuit Court of Appeals that the unclean hands doctrine should find, in view of the astonishing facts of this case, unqualified and strict application. It is assumed that this Honorable Court has taken full jurisdiction of this cause, not jurisdiction of one or two matters only of Rude's own designation or selection, as he has apparently contended the Court of Appeals should have done. In any event, the petitioner Rude has attacked certain of the findings of fact as made by the Court of Appeals. He insists (p. 35, brief for certiorari) that there should have been no finding that Rude had not instituted his suit in good faith and says also (p. 37, brief) that Rude did not assert a false and groundless claim.

On our part, we renew our contention that the claim of the petitioner was so unconscionable, so false and so groundless that if the Court of Appeals erred in any regard it was in undertaking to adjudicate Rude's rights at all or to have given him any relief whatsoever, whether absolute or upon condition. This necessitates a review of the pleadings and the evidence, to which we now address ourselves as briefly as may be consistent with a fair exposition of the cause.

The Pleadings Reviewed.

This remarkable case had its origin in a bill in equity filed by the plaintiff Rude on or about the

26th day of March, 1930, directed against the appellant Buchhalter, The First National Bank of Denver and Messrs. Blount, Silverstein and Rosner, attorneys at law.

Since the pleaded issues are of determinative importance, it is conceived that a further statement of the case can best be made by a review of the pleadings.

The Bill.

Briefly, the bill alleges (pp. 1-6, trans.):

That on August 29, 1929, Rude transferred a one-fourth interest of the Colorado Pulp and Paper Company properties to defendant Buchhalter, "on account of" which, the latter executed and delivered to Rude a promissory note in the sum of $67,500.00 due six months thereafter, with interest at 8 per cent, secured by trust deed of like date. Further, that Rude was to receive from Buchhalter one-half of any realized profits, not to exceed $7,500.00;

That Buchhalter sold the above mentioned one-quarter interest, together with another one-quarter interest of said properties, or a total of one-half interest in said properties, to one Binstock; that to consummate such sale it became necessary for Buchhalter to obtain a release of the trust deed above mentioned; that Rude, on or about November 1, 1929, deposited said note in escrow with The First National Bank of Denver, to be turned over to the purchaser on payment to the bank of all proceeds of the sale, which proceeds were to be held by the bank until Buchhalter and Rude "had agreed in writing as to the disposition of said proceeds";

Paragraph IV (p. 3, trans.) alleges the release of the trust deed and the surrender of the note on November 15, 1929, and that the bank received as the proceeds of said sale, $28,080.50 in money and $92,500.00 in bonds of Colorado Paper Products Company;

Paragraph V alleges that on November 18, 1929, Buchhalter and Rude orally agreed at The First National Bank, that Rude "would be paid at once by said Joseph Buchhalter the full amount of his note and accrued interest in cash, in the sum of $67,500.00 plus accrued interest, together with $7,500.00, which Buchhalter had agreed to pay at the time of the conveyance of the property, plus interest," etc.; that it was further agreed $92,500.00 of bonds should be held as collateral to secure said payment to Rude; that cash of $28,080.00 should be disbursed as follows: $16,365.00 to Rude and $11,615.00 to Buchhalter, this latter, it is alleged, to enable Buchhalter to discharge a note then owing by him to The First National Bank, so that certain collateral owned by Buchhalter might be by said bank released, which collateral, it is alleged, Buchhalter agreed to immediately sell and pay Rude "the baance due him of $59,699.00"; that such disbursements were made by said bank and the Buchhalter note was paid and his collateral released; that "there remains due and unpaid from Buchhalter to Rude $59,699.00," which has been demanded, but without avail.

Paragraph VI (p. 4, trans.) sets forth that The First National Bank holds under this escrow, $90,000.00 in bonds and $2,500.00 in cash; that by reason

of the alleged facts, Rude is entitled to "an equitable lien on said assets to secure the payment in full of said sum due from Buchhalter, and by the terms of said agreements hereinbefore set forth the said assets are pledged and found as collateral to secure to said plaintiff the payment of $59,699.00"; that such payment has been refused; that plaintiff is without adequate legal remedy; that the bank claims a lien to secure a Buchhalter indebtedness of $1,250.00; that the bank has "full knowledge of said escrow and said agreement, and without the knowledge or consent of said Rude"; that the bank's rights are subordinate to Rude's, but it none the less claims priority for its lien, and that the escrow agreement with the bank provides that said assets ($90.000.00 of bonds and $2,500.00 cash) "shall be held by it until such time as I. Rude and Joseph Buchhalter have agreed in writing concerning the disposition thereof."

It is to be especially noted that this escrow agreement is disposed of by plaintiff in his bill, as follows:

> "Plaintiff alleges that they (Rude and Buchhalter) have not agreed in writing and that it is impossible to obtain an agreement in writing concerning the disposition of said cash and bonds; that defendant bank refuses to recognize the lien of plaintiff and refuses to sell said bonds for the purpose of satisfying said lien and refuses to deliver said bonds or cash to plaintiff without the written agreement of Joseph Buchhalter, which it is impossible to obtain."

In other words, it is here alleged the bank refused to do an illegal act, to-wit, violate the escrow agreement at plaintiff's behest, and the suit is brought to require the bank to break an agreement that plaintiff, himself, repudiates, but which he sets forth as the basis of the bank's connection with the subject matter of suit. This, we remark in passing, is a unique door through which to seek entrance into a court of equity.

Paragraph VII (p. 5, trans.) deals with the garnishment claim of Messrs. Blount, Silverstein and Rosner; alleges that these defendants had "full knowledge of the rights of plaintiff and of all the matters set forth in this bill," and alleges that their lien is inferior to that claimed by plaintiff.

The prayer (pp. 5-6, trans.) asks that Rude's alleged lien be declared prior to all others—to that of the bank and the remaining defendants—that the assets in escrow be sold to satisfy a judgment against Buchhalter in the sum of $59,699.00 with interest, etc., said sum having been alleged to be the unpaid balance of the $67,500.00 note.

Buchhalter's Answer (pp. 13-22, trans.).

To the foregoing, the defendant Buchhalter filed his separate answer, which we review with what brevity we may, consistent with clarity.

Paragraph I admits citizenship and jurisdictional amount.

Paragraph II (p. 14, trans.) admits the transfer of the property mentioned as of August 29, 1929; alleges that Buchhalter and Rude were at all times

prior thereto, equally interested in said properties; that said transfer was for convenience only to facilitate a sale thereof in the prospective absence of Rude; denies that the alleged note for $67,500.00, or the coincident trust deed were executed on account of or as a consideration for said alleged transfer; avers that such were executed in order to expedite a purchase of said Buchhalter and Rude interests by one Bronstine, then and there and prior thereto, the owner of the remaining one-half interest in said properties; that the trust deed was executed by Buchhalter at Rude's solicitation for the purpose of embarrassing Bronstine in the event of litigation between Rude and Bronstine; that the note of August 29, 1929, and the trust deed as between the parties were fictitious and represented no obligation whatsoever; were delivered to Rude upon his agreement never to seek to enforce or collect the same as against Buchhalter, his heirs or any other person; that the same was to be cancelled and destroyed either upon a sale of said property, or if ineffectual to induce or expedite a sale, then also to be destroyed. The bill's allegation respecting $7,500.00 of profits to be paid Rude is denied, and it is denied that there were any profits; that the only agreement ever existing between Rude and Buchhalter was for a joint division of the proceeds of the sale of said property when such sale might be made; that the respective rights of Buchhalter and Rude were unaltered by the alleged note and trust deed.

Paragraph III (p. 16, trans.) admits the sale to Binstock; avers that such sale was approved in all things by Rude; that the note and trust deed

were cancelled and released; that The First National Bank retains the proceeds subject to the written directions of Buchhalter and Rude, and which directions were given so that Buchhalter and Rude might check up and ascertain their exact and respective interests.

Paragraph IV admits the deposit of funds and bonds in the bank, and the cancellation of the note and trust deed.

Paragraph V denies the entire alleged oral agreement at The First National Bank; denies that Buchhalter ever agreed to pay a $67,500.00 note or any part thereof; denies that Buchhalter ever agreed to pay $7,500.00 as a part consideration of the transfer; alleges that such a recital was placed in a letter to Rude contemporaneously with said pretended transfer so that Rude might exhibit it to his associate, Bronstine, in order to convince the latter that a deal, as distinguished from a colorable transfer, had taken place.

It is further denied that Buchhalter ever agreed that the bonds and funds in The First National Bank were to be allowed to remain there as collateral to any payment whatsoever; denies that any payment was ever agreed to be made; admits the disbursement of a sum of $28,080.00 by the bank, in round number $16,000.00 to Rude and $11,000.00 to Buchhalter; that the reason why Rude received $5,000.00 more than Buchhalter on the occasion in question was to enable Rude to pay the sum of $5,000.00 to Blount, Silverstein and Rosner for attorneys' fees for the joint account of both Buchhalter and Rude;

denies again any indebtedness to Rude; denies any agreement to sell any collateral for Rude's benefit; that Buchhalter's collateral held by the bank consisted only of securities to the approximate value of $6,000.00, all of which Rude well knew. Again repeats the only agreement ever had between Buchhalter and Rude respecting the matter in litigation was to share and share alike in the proceeds of the sale of their joint equitable interests.

Paragraph VI (pp. 19-29, trans.) admits The First National Bank holds said proceeds; denies any lien in favor of Rude or any agreement for any lien; denies any indebtedness to Rude; denies any other liens are secondary; alleges the reason for the parties' inability to agree in writing to the distribution of said assets to be solely due to the fraudulent and corrupt conduct of Rude; further asserts Buchhalter's willingness at all times that Rude should receive his proper amount of said assets, and alleges Rude's refusal to receive the same.

Paragraph VII (p. 21, trans.) again denies any lien in Rude.

Paragraph VIII alleges Rude is not in court with clean hands; that his entire pretended cause of action is fraudulent; that Rude is seeking in effect to enforce as against Buchhalter, the pretended note for $67,500.00, which was not a bona fide instrument, and which was agreed by Rude never to be enforced; that Rude seeks to impose a personal liabilty against Buchhalter instead of accepting his proper share of the proceeds of the sale, and that Rude is seeking to impose not only upon all of the

defendants, but on the court as well; that in equity and good conscience the bill should be dismissed, and corresponding relief is prayed.

The remaining defendants, The First National Bank and Messrs. Blount, Silverstein and Rosner, filed separate answers (pp. 26-29; and pp. 22-26, trans.).

The First National Bank denied (p. 26, trans.,) either for want of knowledge or absolutely, almost all the material allegations of Rude's bill. It admitted its receipt of the escrow proceeds (cash and bonds heretofore mentioned) and that the same were held by it until Rude and Buchhalter had agreed in writing as to the disposition thereof. It admitted the cash disbursements to the parties, as stated in the bill, alleged that on January 2, 1930, Buchhalter had assigned to the bank all of his right, title and interest in the escrow to secure an indebtedness of $1,250.00; alleged that no demand had ever been made by Rude upon the bank to sell the said escrow proceeds, as by him alleged, and further averred that if such demand had been made, compliance would have been refused; admitted that the firm of Blount, Silverstein and Rosner had attached said escrow proceeds as against both Rude and Buchhalter, and set forth that the lien of those defendants was secondary to that of the bank; whereupon the bank prayed "for instructions of this court as to the disposition of said cash and bonds" and for general relief.

Messrs. Blount, Silverstein and Rosner answered the bill at some length (pp. 22-26, trans.). Like

both Buchhalter and The First National Bank, they denied practically *in toto* the truth of the material allegations of the bill. It will be recalled that Mr. Rude charged in his bill that these defendants had attached the escrow proceeds "with full knowledge of said defendants, and each of them, of the rights of plaintiff and of all the matters set forth in this bill"; they particularly denied the validity of the $67,500.00 note made the basis of suit; alleged it to have been, between Rude and Buchhalter, absolutely fictitious, without consideration; that it represented no personal indebtedness as between Buchhalter and Rude and that the latter received it upon the express agreement and condition that he would never seek or attempt to enforce either it or the purported trust deed of coincident execution; that it should never pass from his possession save to be destroyed in the event of a sale of the properties which the trust deed purported to cover; or, if eventually there was no such sale, that this note and trust deed should also be destroyed and that it was the agreement between Buchhalter and Rude that their respective interests, as theretofor existing in the said properties, should be wholly unaffected by this paper transaction. These defendants particularly denied that Rude had or ever possessed any lien or rights or interests, as claimed by him in his bill, and denied any knowledge whatsoever on their part of any such pretended rights or interests, as attempted to be asserted, and upon the contrary, alleged that the plaintiff never was possessed thereof. Dismissal was prayed.

All answers were under oath.

The Issue.

Stripping the case of its immaterialities and details, it will be perceived that there was, by the pleadings thus presented for the court's determination, the question whether the alleged note of August 29, 1929, from Buchhalter to Rude, in the sum of $67,500.00, represented an obligation to Rude, or whether it did not; and if it did, whether Buchhalter promised Rude at The First National Bank on November 18, 1929, to pay (p. 3, trans.; Par. V bill) "the full amount of said note and accrued interest in cash in the sum of $67,500.00 plus accrued interest, together with $7,500.00 which Buchhalter had agreed to pay at the time of the conveyance of the property," and to such end, promised to sell his private collateral in order to make such payment to Rude, and until so paid, Rude should have a lien upon the entire escrow proceeds in gratification of such asserted personal obligation.

Or whether:

Abandoning and repudiating the escrow agreement, Rude came into court with unclean hands in the attempt to convert an interest in the escrow proceeds into a personal obligation against Buchhalter through the medium of a fictitious note and trust deed and thus become possessed, if he could, of the entire proceeds, and more.

Further Statement of Case.

At this juncture it seems pertinent to repeat that long before the institution of Rude's suit, the validity of the $92,500.00 of bonds in escrow in The First National Bank was, and all during the pend-

ency of this case continued to be, involved in litigation in the Supreme Court of Colorado, and hence the bonds were without market and of wholly problematical value (p. 72, trans.).

Due to the dispute of these parties over this transaction or otherwise, a pronounced acrimonious condition arose between Rude and Buchhalter and it was Rude's boast on the witness stand (p. 79, trans.) that it was his intention to "break" Buchhalter, as it had been his prior boast to the witness Rosner (p. 99, trans.) that he was going to "get" Buchhalter at whatever cost and that he knew the note in suit was fictitious.

Another sidelight on the purposes and motives of the plaintiff is afforded in the fact that he wrote to the wife of the defendant Buchhalter, prior to the institution of this litigation, that unless a settlement "satisfactory" to himself was made, adverse publicity for the whole family would ensue (p. 79, trans.) (Defendant's Ex. 5; p. 229, trans.), and that they would be "dragged through the mire."

Such were the issues and sidelights at the outset of the trial. At its conclusion, counsel for the plaintiff abandoned the note as the basis of liability against Buchhalter (p. 187, trans.) and attempted to substitute as the basis of recovery, the alleged oral promise stated by Rude to have been made to him by Buchhalter at The First National Bank on November 18, 1929, but Rude's allegations and testimony in that regard were to the effect (pp. 68, 69, 75, 80, 84, trans.) that Buchhalter merely promised

to pay the balance of the note, and contended that it was at all times a valid instrument (p. 75, trans.).

The plaintiff rested no less than twice in this cause (pp. 70, 88, 94, trans.). Upon the first occasion, a motion was interposed by the defendants to dismiss because no prima facie case had been established (p. 70, trans.). This motion was not ruled. Upon resting the second time, a similar motion was made (p. 88, trans.), but still not ruled. Upon resumption of trial at the second session and with new counsel, leave was asked and granted, over emphatic objection, to reopen the case for the purpose of introducing further testimony by the plaintiff Rude (pp. 89-94, trans.). On this occasion, two and one-half months subsequent to the first session, Rude undertook to supply testimony to meet the objections made in the motion to dismiss. Prior to this occasion, he had nowhere testified that Buchhalter had ever promised him a lien upon the escrow funds and bonds, nor was such ever hinted at or intimated by him at any time while on the stand, and hence the record, to that juncture, was necessarily destitute of any testimony respecting the right of Rude to go into equity, the object of his suit having been to foreclose a lien.

The court, however, permitted this testimony to be received and to remain in the record as against a motion to strike (p. 92, trans.), notwithstanding the fact that Rude had twice previously testified (pp. 81 and 86, trans.) that he had given the entire bank conversation, or all that he could remember. The court's perusal of this astonishing testimony

is respectfully invited. It is to be found as stated, at pages 89-94, transcript.

The trial was finally concluded November 6, 1930. The court, after taking the case under advisement for some three months, on January 30, 1931, handed down his memorandum (pp. 255-262, trans.), directing the dismissal of the case as to all the defendants. The plaintiff got leave to file, and subsequently presented, a petition for rehearing, such petition being directed not to the decree, as practice requires, but to the memorandum. The petition was overruled. The defendant Buchhalter tendered findings of fact (pp. 38-43, trans.), concurred in and approved by defendant The First National Bank, drafted in conceived accord with not only the court's memorandum, but the facts and the law applicable. These tendered findings were rejected. After numerous appearances and much discussion, the findings appearing at pages 43-44, transcript, were finally entered and a short decree (p. 45, trans.) was signed, dismissing the case at plaintiff's cost.

To this decree there was filed, in behalf of the defendant Buchhalter, a motion to amend or modify (pp. 45-47, trans.), and seeking to have the court dissolve the escrow in The First National Bank and direct that institution to turn over to Buchhalter the funds and bonds held by it, as heretofore indicated. The court likewise refused this motion and the case ended, leaving the parties in all respects as though the suit had never been instituted, other, perhaps, than to preclude Rude from filing anew

his identical bill. In consequence, Buchhalter perfected an appeal to the Circuit Court of Appeals seeking the entry of the rejected findings of fact and the dissolution of the escrow under the unclean hands doctrine, and Rude likewise appealed.

The Theory of the Plaintiff's Case as Made by the Bill and the Evidence.

It is, we respectfully submit, incontrovertible that the case, as attempted to be made, was founded upon the note of August 29, 1929, in the sum of $67,500.00 plus the sum of $7,500.00, or a total of $75,000.00.

Paragraph II (p. 2, trans.), of the bill alleges the transfer of the property and the execution of the note in consideration of that transfer.

Paragraph V (p. 3, trans.) of the bill alleges Buchhalter's promise to pay Rude "the full amount of his note and accrued interest * * * together with $7,500.00, which Buchhalter had agreed to pay at the time of the conveyance of the property hereinbefore described, plus interest at the rate of eight per cent per annum from the date of said sale to Binstock."

The suit purports to give credit (p. 4, trans.) upon the amount of the note ($67,500.00 plus $7,500.00), crediting the sum of $16,365.34 drawn by Rude from The First National Bank of Denver, or a balance of $59,699.61. The prayer for judgment is in that sum (p. 6, trans.). No suggestion of indebtedness from Buchhalter to Rude is even faintly intimated, save upon the basis of the validity of

the note and the actuality of the transfer of the property from Rude's name to that of Buchhalter. No contract, no promise to pay is mentioned save as it is founded upon the note given, as it is alleged, for the transfer of the property, and such was the whole and complete theory, not only of the bill but of the answer as well and all of the evidence, both on behalf of the plaintiff as well as that on behalf of the defendants.

We turn to the record for Rude's testimony on direct examination (p. 59, trans.):

> "He (Buchhalter) guaranteed me inside of a week he would have it all cash and the note would be paid out."

Rude states, in identifying the note in question, Plaintiff's Exhibit D (p. 60, trans.):

> "That is the note given me for the amount of money for the transfer."

And on the same page, Rude swears he told Buchhalter:

> "You know I wouldn't foreclose on you if the property is not sold in six months; that I will extend the note."

Again on page 6, transcript:

> "That I should let him (Buchhalter) have the money he owes to the bank and he will take up all the securities and pay me the full of the note."
>
> "Q. He would pay you the full $67,500?

"A. Yes. * * * he is going to sell some of his collateral and pay me in full."

And for further testimony see pages 74-75, transcript, cross-examination of Rude, where he makes particular other references to the note, and where he again asserts its validity and says he promised to extend, and not foreclose it. And yet again, at page 76, transcript, the following appears:

(Cross-Examination)

"Q. So you claim it was a valid deal at all times, this particular deal?

A. Yes, sir.

Q. And this note was a valid note from the time given, up until now?

A. Yes, sir.

Q. That is your contention?

A. Yes, sir."

And yet again (p. 80, trans.) Mr. Rude states he was to get $67,500.00 plus attorneys' fees, etc.; and at page 84, transcript, the same Mr. Rude testifies as follows:

"Q. Did you ever tell Mr. Silverstein anything in relation to your dispute with Mr. Buchhalter, that you were relying on this note?

A. I had a long conversation with him. I don't know what particular incidents. We were talking about two hours.

Q. Did you tell him Mr. Buchhalter wouldn't pay the note?

A. That he wouldn't pay the note as we agreed in the bank; that he backed out."

And finally, see page 69, transcript:

(Direct Examination)

"Q. Mr. Rude, state what Mr. Buchhalter said relative to paying you the balance due on your note.

A. He says he is going to sell $25,000 worth of bonds to a man by the name of Mr. Hurd in the morning, and in addition to that, he is going to sell some of his collateral and pay me in full."

The tenor of Rude's whole rebuttal testimony was to adhere to the note and its validity, and there was no suggestion at any time during the progress of the trial that we were to be called upon to meet the contentions found in italicized words on page 37 of Rude's brief, on certiorari, that "The suit was not on the note."

Rude's Testimony Reviewed.

Notwithstanding that the suit is upon the note for $67,500.00, and its pretended obligation, Rude's own testimony shows that the dispute is, in fact, of a different character. One Bronstine and himself had acquired at Master's Sale, properties of the old Colorado Pulp and Paper Company (p. 58, trans.). He and Mr. Bronstine were, and until the so-called Binstock deal, had been, under contract with respect thereto (Plaintiff's Exhibit A., p. 189, trans.). The details are unnecessary at this juncture. Buchhalter was a silent associate with Rude in his purchase

(p. 58, trans.). As between themselves, their interests were fifty-fifty (p. 196, trans., Ex. B). Rude carried Buchhalter's interest, as trustee, from the date of the Master's Sale early in June, to August 16, 1929 (p. 47, trans.) without Buchhalter possessing any written evidence whatsoever of his interest (p. 73, trans.). Commencing about June (p. 73, trans.), until the latter part of August, 1929, Rude endeavored many times to sell both his and Buchhalter's interests to Mr. Bronstine, but without success; that Rude retired (p. 59, trans.) because Buchhalter said if title was in his name he would make a sale to Mr. Bronstine; that Buchhalter thought he would make a sale within forty-eight hours (bottom p. 58, trans.). Page 59, transcript, Rude asserts that Buchhalter said he would make a sale in twenty-four hours. Further (p. 59, trans.), that Buchhalter "should handle the proposition himself if he feels so sure he is going to make a sale"; and again (p. 74, trans.) Rude admits that he entered into a "campaign against Bronstine" to induce a purchase by the latter; states that the mortgage in question was placed on the property to "make Bronstine buy", and because he got tired of being harassed and worried by Buchhalter as to what he should do with Bronstine.

Without adverting to other and similar testimony in the record, sufficient appears to conclusively establish that the object of the dealings between Buchhalter and Rude *inter sese* was to effectuate a sale to Bronstine. Then what happens? Rude conveys the entire interest to Buchhalter as of date August 29, 1929, craftily procuring the note and

mortgage in question. This transfer was in violation of an agreement between Rude and Bronstine that Buchhalter should not be in the management (p. 72, trans.). Nothing happened immediately, save that Buchhalter undertook to take forcible possession from Bronstine (p. 62, trans.). An encounter ensued (p. 62, trans.), immediately after which, Rude states that he told Buchhalter (p. 62, trans.): "You go and get Morris Block, and that is the only thing left now, for you to get Morris Block, and I believe you can get a sale out of Bronstine. He is the only man that can arrange a sale now."

It then developed that Block had already been trying to negotiate a sale to one Binstock, an associate of Bronstine's (pp. 62-63, trans.). Mr. Block reported (p. 63, trans.) that he had a proposition of "$38,000.00 in cash and the balance in bonds"; that the total sale price was to be the amount invested "that *we* had behind the property" (p. 63, trans.); that Rude and Buchhalter discussed the proposition in the following way (p. 63, trans.):

(Buchhalter): "What do you think of that deal?" "I says, 'as far as I am concerned, for my share, if I was to make a sale, I wouldn't take any bonds. I would take no bonds'." "Morris Block said, 'That is out of the question. You can't get cash. They haven't got cash. You can only get what they have got'." "I says, 'He can do what he wants'." "He (Buchhalter) said, 'Will you take bonds for your half?'" "No," I said, "I don't want any bonds, but I will do this. If you will give me $40,000 I will take the balance in a note from you for the balance of the account."

There is no suggestion that Buchhalter agreed to the foregoing. Rude states what he wanted and what he did not want. The most that is even suggested respecting Buchhalter in this matter is to the effect, apparently in an effort to please (p. 65, trans.), that he tried to get more cash. In any event, prior to leaving the city Rude left a release of the trust deed, executed a few days before, so that the deal might be consummated, but retained the note for $67,500.00 in his possession.

This discussion and the release of the trust deed took place a very few days after August 29, 1929, the date of the pretended transfer to Buchhalter (p. 62, trans.), and the date of the $67,500.00 note, and immediately after Buchhalter's attempt to take forcible possession, and we find Rude urging that Mr. Block's good offices be invoked to make a sale, and we find him discussing what he would take for his "share" and for his "half". He wanted $40,000 in cash and the balance in a note. For what? For the payment of the $67,500.00 note? Not at all. In payment for his half, and admits the $67,500.00 note or the $75,000.00 "letter" was not discussed (p. 65, trans.).

Can it be concluded that there then or ever existed any obligation from Buchhalter to Rude, as respects the note? If there were no note, there was no suit as pleaded. Upon any aspect of ordinary human conduct, would a man who had just sold to another in any bona fide transaction, be arguing what he would take for his "share" or for his "half" of the property to be further sold? His note, if he had it, was the measure of his rights.

There was never any agreement even hinted at by Rude that the note was to be paid out of proceeds, either bonds or cash. The note was for a period of six months, hence to mature February 29, 1930.

The foregoing establishes beyond the likelihood of successful dispute, that the suit, as instituted, was baseless; that there was no note nor any promise to pay it. Up to this juncture we are indebted to Rude alone for all this information. But let us pursue his story and note its contradictions, inconsistencies and inherent probabilities.

After initial discussions regarding the proposed Binstock deal and the leaving of a release of the trust deed, Rude departed Denver. On October 12, 1929 (p. 64, trans.), he received a telegram from Mr. Silverstein, requesting the note so that the Binstock deal might be concluded. Instead of complying direct, the note is sent to The Denver National Bank by Rude, under instructions (p. 220, trans., Ex. 1-9) by letter, indicating that he now, and for the first time since its pretended making, lays claim to it as an obligation. Hitherto the whole discussion with Buchhalter and Block was respecting a sale of his "share", his "interest", his "half". He arrives in Denver, he tells us, on the morning of Monday, November 18, 1929 (p. 67, trans.) seeing Buchhalter on his arrival. Not one word of testimony is given as to any conversations, discussions or pretended agreements from the arrival until 4:30 p. m. that day, when the parties went to the bank (p. 67, trans.). The court was asked to believe that these two men, after a day in each other's society, waited until arrival at the bank at 4:30

in the afternoon to enter into the agreement testified to, the whole taking place in about five minutes, and when Mr. Rogers' (the Vice President of that institution) back was turned! The transaction was one of magnitude. Rude had been absent; he had telegraphed, written and telephoned, inquiring as to the progress of the Binstock deal. He arrives in the morning, is with Buchhalter all day, and the only agreement with relation to the deal, the subject matter of, and the reason for, his presence in Denver, was a few minutes in the bank at 4:30 p. m., when Mr. Rogers momentarily absented himself! That is only one of the preposterous situations set forth as a ground for recovery.

But passing that, here, in detail, is what he says transpired (p. 68, trans.): "Buchhalter called Mr. Rogers to bring out the papers. He asked for the papers * * *, and while Mr. Rogers went back to get the papers Mr. Buchhalter says, 'I want you to let me have some of that money. I have got a large bundle of securities here—so I can go out in the morning and sell it and give you the balance due'." That a $16,000 check (round numbers) was drawn to both Buchhalter and Rude (p. 68, trans.), and both Rude and Buchhalter receipted to the bank therefor, jointly (Defendants' Exhibit 16; p. 236, trans.). That $11,615.00 of the $28,000.00 in the bank was also issued to both; that this sum was applied to an indebtedness owed the bank by Buchhalter. Then we have the following revelation (p. 68, trans.), direct examination of Mr. Rude:

"Q. What did Mr. Buchhalter say regarding the payment of the balance that was due you?

A. He would pay me the balance in the morning.

Q. In cash?

A. In cash, but would not give me a note for the balance—because I was supposed to get $40,000."

This last testimony is almost pathetic in its falsity. Here he says that Buchhalter would not give him a further note because he was supposed to get $40,000—and the suit was to enforce a lien for the payment of a balance of $60,000, round numbers, on a $67,500 note. What can be made of such testimony?

And yet another feature of the alleged bank conversation. Rude is silent. Buchhalter does all the talking, all the agreeing, all the promising—Rude does nothing but receive those promises—no argument, no protest, no debate, no discussion, no revelation to Mr. Rogers nor any one else, of either Buchhalter's indebtedness to him or of the lien, or anything else. We submit that transactions such as that do not take place in real life.

At the many different places in the record where Rude testified concerning the bank conversation, nowhere did he even once so much as intimate that Buchhalter agreed to a lien or that any such subject was ever discussed, save when, at the instance of new counsel, taking the stand after having rested, in order to escape the effect of the defense motion to dismiss (pp. 91-93, trans.).

At page 69, transcript, he states: "The bonds were left with the bank." Yet the suit is to establish a lien upon the bonds per contract. On cross-examination (p. 81, trans.) he again testifies to the bank conversation, but nowhere refers to or suggests any promise or contract for a lien (p. 86, trans.). On particular and minute examination, examining counsel, specifically having it in mind to develop whether the matter of lien had ever been discussed, Rude testifies that he has given the entire conversation, the "main points", the "gist of it", and upon examination by the Court respecting it, stated that he had given "all that he can remember". Yet, after two and one-half months' recess and the acquisition of new counsel, he retakes the stand to testify that at the same time and place, and in the same bank conversation, many times theretofore testified to by him, it was the agreement with Buchhalter that he should have a lien, saying variously that he called his counsel's attention to the situation, that he had not previously testified respecting the so-called lien, and then that his new counsel called his attention to it (pp. 91-93, trans.). He claims that he first discovered the omission upon reading the transcript on the train; later asserted he told his counsel about it, and his counsel told him about it. What can be thought of this matter? Is it humanly possible to accord good faith or honesty to such testimony? Is it humanly possible to say, wholly irrespective of any other phase of the case, that Rude's testimony carries any conviction whatsoever, other than that of its own falsity?

But why, if Rude was to be paid cash the next

morning, could or would any conversation arise in the ordinary course of human conduct, respecting any lien; is it natural or likely or conceivable, as men do business, that a promise to pay the next morning would be supported by the additional promise of a lien over night, especially when the escrow was held subject to the joint order, and the written directions of both parties? Is such a situation as Rude's afterthoughts disclose, within the range or the limits of normal conduct? Is it likely, if Rude had an agreement with Buchhalter, either for a lien, or, for that matter, to be paid in cash the next morning, that he would not have told Mr. Rogers about it? Why was Mr. Rogers so completely disposed of during the entire alleged agreement? No word was said before Mr. Rogers "went back to get the papers". No word was said after Mr. Rogers returned with the papers, only silence, and the surrender of Buchhalter's collateral and the issuance of a cashier's check jointly to both parties.

But let us proceed. Messrs. Buchhalter and Rude were together all that evening, the evening of November 18, 1929 (p. 69, trans.); that Mr. Block joined the meeting at Rude's personal request (p. 81, trans.). On cross-examination (p. 81, trans.) regarding this, Rude testified that nothing was discussed "except the attorneys' fees"; that nothing was agreed to (p. 82, trans.); that he wanted Mr. Block to put down certain figures; that Mr. Block refused to do so, notably a $14,000.00 item (p. 83, trans.); that the only basis upon which he would participate in attorneys' fees to Messrs. Blount, Silverstein and Rosner was that Buchhalter should put back the

sum of $14,000.00 "that he had made a profit in the paper mill claims". But how does this conform to what happened? On the very next day, on November 19, 1929, the day after drawing down the money from The First National Bank, the day after the alleged promise of the lien, the very day in which Rude says Buchhalter promised to pay him "the balance in full of his note" by the sale of collateral on the market, we find the parties in Mr. Silverstein's office, paying him $5,000.00 (p. 81, trans.) and signing a written promise, along with Buchhalter, to pay the remaining $10,000.00. Defendants' Exhibit 15 (pp. 235-6, trans.) is the Silverstein bill, in effect an account stated, approved by both Rude and Buchhalter, and dated November 19, 1929, and acknowledging the receipt, as of that date, of $5,000.00 on account. But what does Rude say respecting this $5,000.00? He states that it was another loan to Buchhalter (pp. 87, 88, trans.). Think of it! On this, the 19th day of November, 1929, the very day on which Rude says Buchhalter was to pay to him in cash the large sum of approximately $60,000.00, we find him "loaning" Buchhalter $5,000.00 more, taking no note or other evidence of indebtedness at all, and never making demand therefor—never, he says, never conversing with Buchhalter again (p. 88, trans.). Can it be believed Rude would loan Buchhalter anything further whatsoever, when Buchhalter was on that very day in arrears of the payment of about $60,000.00?

But let us pursue this $5,000.00 transaction a step farther. He states that the last time he ever communicated to Buchhalter was "that night", which

would be November 19, 1929. The record shows that on November 22, 1929, Rude wrote Buchhalter a letter agreeing that Block should have $500.00 commission for negotiating the Binstock deal. This letter was offered in evidence, as Defendants' Exhibit No. 7. This was four days after the alleged promise of Mr. Buchhalter "to pay the balance of the note" the next morning. This was four days after the alleged promise for a lien. This Exhibit 7 reads:

> "November 22, 1929.
>
> "Mr. J. Buchhalter, Denver, Colorado.
>
> "Dear Sir:
>
> "I am agreeable that Morris Block should receive $500.00 for services rendered in connection with the sale of the mill for which I agree to stand one-half or $250.00.
>
> (Signed) I. RUDE."

The receipt on the bottom of this exhibit shows that Mr. Block received the $500.00 at the hands of Buchhalter, doubtless in reliance upon Rude's promise to stand "one-half". If Buchhalter was indebted to Rude on the note, or for that matter in any other personal way in connection with the sale of the mill, why should Rude stand one-half or any other proportion of the commission exacted for the sale of the property? If the hypothesis of the parties' relations was as Rude pleaded and testified, to-wit, a sale to Buchhalter, and the execution of a valid note, assuredly Rude would have spurned the payment for services to Mr. Block in further disposing of the property, and more specifically would

he have done so at a time when Buchhalter was four or five days in default of paying him the sum of $60,000. If Buchhalter was indebted to Rude for the balance of a $67,500.00 note plus the further item of $7,500 besides, it is beyond comprehension to even surmise why he should bear one-half the expense of disposition, either at all or especially under the circumstances at the time set forth, and also at a time when Buchhalter, according to Rude, had borrowed the further sum of $5,000.00 from him. Amazing recital!

But that is far from all. On this same date, November 22, 1929, we find Messrs. Rude and Buchhalter signing, along with Messrs. Blount, Silverstein and Rosner, and Mr. Rosenbaum as a witness, a declaration reading, in part, as follows (Defendants' Ex. 8) (pp. 229-230, trans.):

> "Inasmuch as a controversy has arisen between I. Rude and Joseph Buchhalter concerning the proceeds resulting from the sale of their interests in the assets of the Colorado Pulp Mill, in which are involved $92,500 in bonds of The Colorado Paper Products Company,"

etc.; that the *status quo* of said bonds should remain without change for a period of thirty days; that Messrs. Blount, Silverstein and Rosner should take no action respecting their bill for attorneys' fees, etc.

Does not the foregoing conclusively negative Rude's testimony that he had had nothing further to do with Buchhalter after November 19, 1929?

Does not the recital that the dispute is over "the proceeds resulting from a sale of their interests" conclusively establish that there is not and was not any note whatsoever involved? If Rude was then claiming the payment of a note and had been promised the payment of its balance, and had been promised a lien on the bonds, is it conceivable, as men do business, that he would have subscribed recitals such as the foregoing?

But yet again, in Rude's only communication to the bank, after all these alleged agreements, he says in Defendant's Exhibit 13 (pp. 234-235, trans.), under date of January 20, 1930, that he wishes to advise the bank "that certain difficulties have arisen between Joseph Buchhalter and myself with respect to the bonds of The Colorado Paper Products Company, and moneys derived therefrom, which you now hold in escrow, subject to the joint direction of myself and Joseph Buchhalter. You are therefore hereby instructed not to do anything or make any release in connection with said escrow, except on my written order" and asked to be notified "in the event you receive any papers, notice or other information in regard to the above escrow." So it appears over his own signature that as late as January 20, 1930, or two months and two days after the alleged promise of a lien, and after the alleged promise of payment in full of his note (the payment to be made on November 19, 1929) he still kept the secret locked within his breast, that Buchhalter had promised to pay him the balance due on the note for $67,500.00, by the sale of collateral on November 19, 1929, and that he had by promise, a lien on the escrow to

secure such alleged payment. If the alleged agreements with Buchhalter were true, why the profound secrecy about them, why accept from the bank a cashier's check to the joint order of Buchhalter and himself, without protest or remark? Why sign a joint receipt to the bank for that sum without protest or remark? Why, never at any time communicate to the bank or anyone else the secret of the lien, and the promise to pay the balance of the note? Why the occasion for giving a lien over night on an escrow held subject to joint order? Why the occasion of discussing a further note, as Rude says (p. 85, trans.), if Rude was to be paid the next morning? Why, on November 22, 1929, promise to pay one-half of the commission? Why, on November 22, 1929, subscribe recitals that a dispute had arisen over the sale of their interests if there was or had ever been any such promise to pay, or any lien given, or if Rude's hypothesis is true in any particular? The answer, perforce necessity, is that Rude's whole story is completely baseless, wholly false.

But to trace a few more devastating inconsistencies (p. 78, trans.).

Cross-Examination.

"Q. Did you ever tell Buchhalter you wanted him to buy those bonds?

A. Buchhalter agreed to buy the bonds.

Q. When did he agree?

A. He agreed on the night of September 3rd or 4th.

Q. Then they were your bonds?

A. They was my bonds. They were the only bonds in question. I told Mr. Buchhalter before that, when the deal was approached by Mr. Block, that I will not take any bonds in payment of my note."

It will be remembered that on August 29, 1929, Rude made the transfer to Buchhalter and received the note in question, yet on September 3rd or 4th he claims to own bonds that were not yet in existence, and did not come into existence until the closing of the Binstock deal in October, and asserts Buchhalter agreed to buy those bonds. He owned the bonds, Buchhalter agreed to buy the bonds, and yet he would not take them in payment of his note. We leave it to this Honorable Court to analyze this, if it can. We confess our own inability to do so, except he intends to testify he was to get bonds which Buchhalter was to buy from him. Such, of course, was not the case attempted to be made, either in pleadings or testimony. It again decisively demonstrates that there was no valid note as between the parties. There was no personal obligation. Rude simply wanted Buchhalter to take his share of the bonds off his hands for cash. His suit on the note becomes worse than reprehensible. It crossed the border line of criminality.

But yet another inconsistency. Rude recites (p. 80, trans.): "I didn't expect any profits but I paid out $2,500 attorneys' fees * * *. I was to get the money that I laid out for attorneys' fees in addition"; and then states: "I was to be getting about $70,000."

Buchhalter had an investment of about $59,000 (p. 117 trans.), and Rude, $61,000; yet Rude was to have returned to him attorney's fees, making a total coming to him, he says, of $70,000, out of a total of $120,000, his to be all cash, Buchhalter to retain bonds for which an offer of seventy-five cents on the dollar had been received. But we find Rude, notwithstanding he was to have $2,500 attorneys' fees returned to him by Buchhalter, agreeing, along with Buchhalter, to pay Messrs. Blount, Silverstein and Rosner $15,000 (Defendants' Ex. 15), and we find him writing a letter to Buchhalter under date of August 16, 1929 (Plaintiff's Ex. B) (p. 196, trans.), that they, Buchhalter and himself, are in the deal on a "fifty-fifty" basis!

But yet another inconsistency. Under date of September 17, 1929, or about three weeks after the transfer to Buchhalter and the execution of the pretended $67,500 note, Rude, in defendants' Ex. 3 (p. 227, trans.) writes to Mr. Bronstine that he is at all times "ready, able and willing to carry out that agreement (the agreement of May 14, 1929, between Bronstine and Rude) * * * so far as my part is concerned".

Reference to the agreement mentioned (Plaintiff's Ex. A) (p. 189, *et seq.*, trans.) discloses that amongst other requirements, the parties, Rude and Bronstine, agree (paragraph 8) to make advances of further capital if necessary to operate the mill. Such, Rude says, he is ready to do, notwithstanding the transfer to Buchhalter as of August 29, 1929.

Mr. Rude's Story is Inherently Improbable.

We have seen that the validity of the bonds in question, or rather, the legality of the Master's sale, whereon the bonds rest, is and ever since and very shortly subsequent to such sale has been, in litigation in the Supreme Court of the State of Colorado, and which question still awaits determination (p. 72, trans., Rude's testimony). We learn that the only offer made for the bonds ever to be received by Rude was seventy-five cents on the dollar (p. 80, trans.). We have seen that Rude's investment was $61,000 and that Buchhalter's was and is about $59,000. We know that in the first half of the month of November, 1929, there ensued the greatest stock market collapse in economic history. Yet, in the midst of this disaster, according to Rude, Buchhalter promised him at The First National Bank on November 18, 1929, that he, Buchhalter, would sell sufficient personal securities on the next day's demoralized market so as to realize the enormous sum of $60,000, and thus pay in full "the balance of the note." Is it likely, stock market crash or not, that Buchhalter, if sane, ever made such a promise or contract? His desire to retain litigated bonds, for which seventy-five cents on the dollar had been offered, could have hardly been so intense.

Let us examine this further in the light of attending conditions. We ask, leaving, for the moment, out of discussion every other consideration, such as to what Buchhalter would have left to represent his investment if he were to pay Rude, under any circumstances, the amount the latter states, is it in the range of human probability that in the

very midst of actual world-wide financial distress, pregnant with threats and fears of worse, that Buchhalter would tell Rude that he would dump enough collateral on a panic-stricken market to realize in one day, one morning in fact, the sum of $60,000 principal and interest in order that Rude might go his satisfied way, while he, Buchhalter, retained, as consolation, some bonds, the validity and worth of which were in dispute and all this at the cost of a staggering amount of other collateral? Rude testifies to such promise on Buchhalter's part, as of date November 18, 1929, and under the conditions stated. But, for argument's sake, let us eliminate the market condition. The total sale price was $120,500, $92,500 in bonds and $28,000 in cash. Let us assume it was all cash; according to Rude's story he was to receive $60,000 plus the $16,000 already received—round figures $75,000 to $76,000—out of $120,000. In other words, for a $61,000 investment he was to receive $75,000 or $76,000. Buchhalter, for a $59,000 investment, was to receive about $45,000 and was to reimburse Rude for attorneys' fees also. What becomes of intelligence if one is to accept that?

But let us drop the assumption of cash and adopt the story as Rude relates it, that he was to receive $75,000 or $76,000 in cash, and Buchhalter was to retain the bonds for whatever they may develop to be worth—much, little, or nothing. This involves a further examination of Rude's "evidence." If he, Rude, was to receive $60,000 the "next morning" and the bonds are worth but seventy-five cents on the dollar, it would have taken practically every

bond in escrow to realize the amount Rude seeks, assuming any market could be found at all under the financial conditions then present and the pendency of a suit respecting the validity of the bonds. Again, we respectfully ask, what becomes of intelligence if one is to accept that as having been the agreement between these two men?

In summary, the circumstances, prohibitive of even the speculative truth of any of Rude's contentions, are—pendency of the case in the Supreme Court affecting the very existence of the bonds, the market conditions, and the inherent, utter unreasonableness of the story related.

And besides all the foregoing, equity would not enforce such a contract, if true. Such a contract would be unconscionable, inequitable, unfair and unjust. No such contract, however established, has ever yet been enforced in equity. *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315-325. Rude's case, however, so far from having been established, is destitute of even argumentative plausibility.

Before discussing the evidence in defense, we briefly comment further on Mr. Rude's case as attempted to be made by himself.

We have seen (Par. VI bill; p. 5, trans.), that the escrow is held "until such time as Joseph Buchhalter and I. Rude have agreed in writing concerning the disposition thereof." This, of course, merges all prior oral agreements, if any, between the parties. It merges Mr. Rude's demands for cash instead of bonds. It merges all and singular the nebulous discussion in Block's presence. It merges Buch-

halter's agreement, if any (which there was none) to buy Rude's share of the bonds. The testimony referred to was introduced only to show Rude's utterly inconsistent position—dealing with the property after he had claimed to have parted with it—and then suing on the note. That contract to dispose of the proceeds, as the parties agreed in writing, continued to be in force until Rude's repudiation and disclaimer of it—a repudiation of record when he sued The First National Bank, and made them parties here, on the ground that they would not violate this escrow agreement at his instance and request. Had his desire to break Buchhalter and his cupidity been less intense, the escrow agreement would doubtless be in force and effect. But that is now necessarily out of the case.

Buchhalter is not charged with fraud either in pleadings or proof. He is only charged with failure to keep an alleged oral promise to pay the amount of a cancelled note alleged to have been valid. The only fraud apparent in the case is Rude's attempt to perpetrate one. The true character of the dispute, notwithstanding Rude's many sworn assertions to the contrary, narrows down to his disappointment that there were so many bonds and so little cash, or that Buchhalter would not take his share of the bonds off his hands, and to gratify his animosity he deliberately and corruptly adopted the note in question as a method calculated to destroy his adversary; he was going to "break" Buchhalter (p. 79, trans). His action is wholly transparent: his vision was to sue on the note so craftily procured, and in the event of success in that respect,

he would have succeeded in effectuating his announced purposes. It was a pretty picture that he envisioned. It is repeated, Rude has undertaken to practice a fraud, not only upon the Court, but upon each and every of the defendants as well. He was not only not content in his attempt to break Buchhalter; he desired to deprive The First National Bank and Messrs. Blount, Silverstein and Rosner of their claims as well.

Mr. Rude is not corroborated by a single word of testimony, by a single circumstance, or a single exhibit. On the contrary, his own testimony, all the circumstances and all exhibits conjoin to deny either the alleged indebtedness of Buchhalter to himself or the existence of any contract or agreement for a lien. Further, they conjoin to demonstrate that he unquestionably seeks to perpetrate an enormous fraud by use of the writs, processes and functions of a Court of Equity.

Thus far we have addressed ourselves solely to Rude's testimony and the exhibits, just as though no defense testimony had been offered. We now take up, with what brevity we may,

THE EVIDENCE IN DEFENSE.

The first witness called was

David Rosner (p. 94, trans.):

one of the defendants and a member of the firm of Blount, Silverstein and Rosner. He states that he is well acquainted with both Messrs. Rude and Buchhalter, and that his firm had long been engaged to render professional services for both of

them. He states that he has heard Mr. Rude's entire testimony; that he knows the pleadings in the case and the circumstances of the execution of the note for $67,500.00, bearing date August 29th, 1929, and that his first contact with that matter was on the evening of August 28th, when at about 8:30 P. M. he received a telephone call from Mr. Rude, asking him to come to the office of Mr. Buchhalter in the Roosevelt Hotel, with which request he complied; that upon arriving there he heard a discussion between the two, of certain difficulties they were having with Mr. Bronstine, whereupon Mr. Rude suggested giving a mortgage and note to Mr. Buchhalter; that Mr. Rude stated as his reasons for such a move was because he was worried that there was apt to be a partition suit brought by Mr. Bronstine, his partner in the mill; that the witness asked Mr. Rude what the consideration was going to be for such a note and mortgage and Mr. Rude stated that there was going to be no consideration (p. 96, trans.); he said it was merely a fictitious note and mortgage for the purpose of stopping any law suit Mr. Bronstine might bring against Mr. Rude; that both Messrs. Buchhalter and Rude asked the witness' opinion as to such a move, and they were told by the witness that he did not agree with them, and that he would not draw a note or mortgage of that type for them, but that they had best take the matter up with his firm the next morning, which was done, Messrs. Rude, Buchhalter, Rosner and Silverstein being present, Mr. Blount joining the conference later on. That this last mentioned conference was on the 29th of August, 1929, about 10 o'clock in the morning (p. 97, trans.), whereupon

the first discussion was that Mr. Rude at first wanted himself to execute such a note and mortgage to Buchhalter; that both Buchhalter and Rude were again informed that such instruments would be of no value; that fictitious instruments of that character as proposed would not have the effect of stopping any law suit Mr. Bronstine might bring against Mr. Rude; but after more similar discussion, Messrs. Buchhalter and Rude left, returning, however, later the same morning, perhaps at about 11:30. Whereupon, Mr. Rude said that such a note and mortgage will be executed regardless of what the opinion of the firm of Blount, Silverstein and Rosner was, and that later Rude suggested that Buchhalter had better execute the note and mortgage to him for the reason that he was in business in Dallas, and would not want to have to report an apparent obligation to Dun and Bradstreet, and that then the process was reversed, and it was agreed that Buchhalter should give the note and mortgage (p. 97, trans.).

On page 98, transcript, it is again repeated by the witness that the whole discussion between Rude and Buchhalter respecting the execution of the $67,500.00 note of August 29th, 1929, was in an attempt to embarrass Mr. Bronstine in any law suit that he might bring. The witness, himself, was present (p. 98, trans.) when the note and trust deed referred to was executed and delivered to Mr. Rude; that subsequently the witness had a number of conversations with Mr. Rude, particularly one on January 19th, 1930, on a Sunday morning at the Cosmopolitan Hotel, when Mr. Rude had called him by tele-

phone to come there; that on this occasion Mr. Rude stated (p. 99, trans.) that he was "going to get Buchhalter no matter what it cost him; that he did not care whether this note and mortgage were fictitious or not, or if he knew they were and I knew they were, that he was going after him just the same." He further states that Mr. Rude admitted to him on this occasion that the note and trust deed in question were not valid instruments, but that none the less, he was going to use them against Mr. Buchhalter (p. 99, trans.). Witness was asked to arbitrate the controversy that Mr. Rude professed to have with Mr. Buchhalter; that the witness could never really understand what his controversy was.

Testimony of George Dexter Blount:

States that he was invited into a conference the latter part of August, 1929, in the office of Mr. Silverstein, when were present Messrs. Rude, Buchhalter, Silverstein and Rosner (p. 105, trans.), whereupon it was stated to the witness that Messrs. Rude and Buchhalter had been discussing the proposition or policy of transferring the property from one to the other and placing an encumbrance on the property in order to embarrass Mr. Bronstine, who was threatening to start a partition suit; that the plan was that "Mr. Rude would transfer his title to an undivided one-half interest in this property to Mr. Buchhalter, and Mr. Buchhalter would give Mr. Rude a mortgage back so that the title would be complicated in the event Mr. Bronstine sought to partition the property, and they had planned that out and asked me what I thought about it, and I advised very strongly against it (p. 106, trans.).

I told them it was nothing but a subterfuge, and in my opinion, a constructive fraud; that if they got into a law suit with Mr. Bronstine the whole plan would come out in evidence; that they would have to tell the truth; that I thought it was a useless and a foolish thing to do, and I told them not to do it", but both Messrs. Rude and Buchhalter said in substance that they could not see the witness' point of view; that they thought it was perfectly legitimate for them to put up this trick on Mr. Bronstine, and that such discussion continued for about half an hour by both Messrs. Rude and Buchhalter; that the whole scheme was to enter into a transaction that would "show on its face the transfer of the title to Mr. Buchhalter by Mr. Rude, and the giving of a mortgage back to secure the note"; that witness remembers no figuring or computation in his presence, and (p. 106, trans.) that both Messrs. Rude and Buchhalter stated that the object of giving the note and mortgage and the deed was to fool Mr. Bronstine.

Testimony of Charles Rosenbaum (p. 109, trans.):

This witness states he is an attorney at law, acquainted with both parties, having been and being the attorney for both parties. That on August 29th, 1929, Messrs. Rude and Buchhalter both went to his office in the forenoon of that day, and then proceeds as follows:

> "They explained to me that Mr. Rude and Mr. Bronstine, who held title jointly in the Colorado Pulp Company property, had been having some difficulties between them-

selves, and that they had been unable to get along together, and it was their desire that Mr. Buchhalter be substituted as the half owner, because he, Mr. Buchhalter, felt he could deal with Mr. Bronstine more and could force the matter to an issue either by causing Mr. Bronstine to buy out the other half interest, or to in some way work jointly, and they stated that if this was done they were afraid Mr. Bronstine would file suit for to partition the property, and that he, Mr. Bronstine, was then in a better position to bid in the property at a partition sale than they might be. They stated that they therefore wanted a mortgage drawn representing the approximate amount of their joint investment, and that it was their plan to give the mortgage to Mr. Rude, and asked me first to draw such a mortgage, or, first, whether I would draw such a mortgage, and, secondly, they asked my opinion as an attorney as to whether or not in a partition sale the property would have to be bid in subject to the mortgage of record, or whether the mortgagee, being a non-resident of the state, could be made a party defendant. I thereupon first advised them that I would not draw such a mortgage, and I also turned to Mr. Rude and stated 'I would not advise you to convey the property to Mr. Buchhalter'. I referred to him as Joe. 'I would not advise you to convey the property to Joe because I don't think it would come with good grace after the

understanding between yourself and Mr. Bronstine was that you would be the half owner with him, and that he would not be compelled to deal with Joe, and if this matter of the mortgage ever came into litigation you would not come into court' I believe I used the expression 'with clean hands', and I don't advise you to do this. In any event I will not participate in it by drawing any of the papers."

That Rude complained (110, trans.) that Bronstine had not treated him fairly in connection with certain insurance policies; that witness advised Rude (p. 110, trans.) against taking steps on the proposed note, but stated that he would look into the law as to making mortgagees a party defendant in the event Bronstine instituted suit; that there was discussion between Buchhalter and Rude as to the term of the proposed note and mortgage. The term of three to five years was suggested, but Buchhalter insisted that it be for either three or six months. The desire was to get their money out of the property as soon as possible. The witness repeats that he again refused to draw the mortgage, that he would have nothing to do with such a proposition; that (p. 111, trans.) the amount discussed was approximately $135,000.00, Buchhalter and Rude stating they wanted to make the mortgage so that if the property were bid in by Mr. Bronstine he would be compelled to pay it (p. 111, trans.); that the proposition was for Buchhalter to give a mortgage to Rude because the latter was a non-resident; repeats that all of this conversation transpired in August 29th, 1929; that

later in the afternoon of that date (p. 111, trans.) he was called on the telephone by either Rude or Buchhalter and asked to report what he had found in his investigations of the law as to the necessity of making the mortgagee a party; that considerably later and sometime after the 18th of November, Rude gave the witness a set of figures purporting to represent the amount he claimed against Buchhalter; that Rude showed to the witness the set of figures purporting to represent the amount he claimed against Buchhalter; that Rude showed to the witness the set of figures drawn by Mr. Block and discussed those figures with the witness and that the witness and Rude compiled certain figures from Mr. Block's figures, and that the witness gave Buchhalter a copy of the figures so compiled; that such figures were compiled for the purpose of submitting to Mr. Buchhalter, and that they were so submitted.

Testimony of Morris H. Block:

(p. 114, trans.) Has been long acquainted with both Messrs. Rude and Buchhalter, and negotiated the so-called Binstock deal. About the middle of September, 1929, he went to the office of Mr. Buchhalter in the Roosevelt Hotel, Messrs. Rude and Buchhalter being present, and the witness submitted the Binstock proposal for a purchase of their half interest in the paper mill; that the witness read the proposal to them. It was an offer to pay $19,000.00 in cash, one-half of the net inventory at the time of closing, and the remainder of $92,000.00 in bonds of a company to

be formed by Mr. Binstock after he had acquired the interest. "Mr. Rude said he would not accept it. He said he would not be interested in selling for part bonds"; that if he sold he would expect all cash. Mr. Buchhalter then said "Supposing that I let you have all the cash that comes into this transaction. Would that be fair?" "Well," Mr. Rude says, "No, that wouldn't be fair. It wouldn't be fair to you, Joe, but it isn't a question of fair or unfair I wouldn't sell for bonds." Later on in the conversation Mr. Rude said "But, Joe, I wouldn't stand in the way of a deal. If you want to go ahead with this deal, go ahead with it. I will take whatever cash comes in, and as for the balance I will give you six months or a year." Mr. Buchhalter said, "No, if I am to pay the cash, then I will have to have $10,000.00 more down payment from Binstock, and as for the rest of it I think perhaps I can arrange something at the bank," and I said, "Well, Mr. Binstock could not give any more cash." The meeting adjourned and nothing had been agreed upon; that Mr. Buchhalter declined the deal because he wanted $10,000.00 more in cash; that Mr. Rude declined because it offered bonds and not all cash (p. 115, trans.). Further conversations about the Binstock deal ensued, one of them the next day in the presence of Mr. Silverstein, the 18th or 19th of September, 1929, and the witness submitted to Mr. Rude three instruments for execution. They were a release of the trust deed, the bill of sale for the physical property of the paper mill and a quit claim deed. That their execution was asked so that the deal might be completed in Mr. Rude's absence. Mr. Rude executed the papers, turning them over to

Mr. Silverstein, telling Mr. Silverstein that he, Mr. Rude, would give him instructions as to the disposition later (p. 116, trans.). That a deal subsequently went through, Mr. Binstock offering to go through with the deal as originally presented, and in addition to $2,500.00 of first maturity bonds after they had been issued, after the deal was closed; that later witness presented a bill of $2,500.00 to both Messrs. Rude and Buchhalter for commission in negotiating the sale; that Mr. Rude was present at the time of presentation. Mr. Rude finally agreed to the payment of $500.00, and $500.00 more (116, trans.) if and when Mr. Rude and Mr. Buchhalter were successful in recovering certain moneys from the Receiver of the old paper mill; that the witness was paid $500.00 by Mr. Buchhalter; that Mr. Rude paid him nothing; that witness, at the request of Messrs. Buchhalter and Rude, made a set of figures showing the respective investments and interests; that the figures (p. 117, trans.) put down by witness were from data given by Mr. Rude and Mr. Buchhalter; that he figured with Mr. Buchhalter and Mr. Rude several hours and gave each a copy of his figures, and that each of them accepted them as being correct (p. 117, trans.). Mr. Buchhalter told him he had invested $58,422.32 in the old Colorado Pulp and Paper Company. Mr. Rude told him he had invested $61,000.00 in the same enterprise; Mr. Buchhalter stated that he had drawn down that afternoon from The First National Bank $11,615.22; Mr. Rude stated that he had drawn down that same day $16,365.34; that both Mr. Rude and Buchhalter stated "there was $92,000.00 worth of bonds at the bank then, and they wanted me to figure up what the

interest was to each of them and I figured out that the present investment in bonds at that time, that is, to Mr. Buchhalter was $47,212.48 (118, trans.), and that the present investment in bonds for Mr. Rude at that time was $45,000.00 * * *"; that the date of these figures was November 18th, 1929, the date the funds were withdrawn from the bank. That on this same evening Rude stated to Buchhalter that since the transaction represented a loss, Buchhalter should make some division of $17,000,00 made by him in the purchase of the claims of the old Colorado Pulp and Paper Company, Rude stating that although this was before Rude was in the transaction, and was not legally entitled to any share of that money, but in view of the fact of loss, he, Rude, felt Buchhalter should give half of the profits on those particular claims, to which Buchhalter stated that there was little profit, if any, left. He had paid out commissions, attorneys' fees, etc. Mr. Rude replied he felt he should have half of whatever there was, but that Mr. Buchhalter refused to consent to this. That (p. 119, trans.) Mr. Rude wished an item of $17,000.00 also put down, along with the other figures, one-half of which was $8,500.00, and which Rude claimed. Mr. Rude also requested a $3,000.00 item that he had received be jotted down, to leave a remainder of $5,000.00 coming to him. Such figures were put down "subject to adjustment". Buchhalter, however, gave no consent to any such request on Mr. Rude's part. Respecting the reasons given him for supplying these figures, both parties said, "Well, they said that Mr. Binstock had paid in this money and these bonds into the bank, and they wanted to know how much each one had coming in this transaction."

(p. 119, trans.) That at the time when first the Binstock deal was presented to Mr. Rude and Mr. Buchhalter, Mr. Rude objected as follows:

> "That is a very poor deal for us. The little money they are paying in with the bond issue for so many years, it would really be in effect that they were buying this plant for a very small sum and paying us out with our own money";

that Mr. Rude further said, "I would rather put in $50,000.00 and have Mr. Buchhalter put in $50,000.00, and we will buy their interest." The conversation above referred to was in about the middle of September, 1929 (p. 119, trans.); that there was no discussion on the evening of November 18th, 1929, respecting the $67,500.00 note; that it was never mentioned.

(p. 119, trans.) *Cross-examination.* Witness states that he knew of the mortgage at the time of first attempting to negotiate the Binstock deal and secured releases from Mr. Rude (p. 120, trans.). That there was nothing said by Mr. Rude at any interview respecting money that was owing to him; that Mr. Rude stated he would not take bonds for the money he had invested as the witness understood. Witness knew nothing of any money coming to Mr. Rude. Witness recalled no reference to the $40,000.00 in cash; that witness stated Rude would not accept bonds upon the sale (p. 120, trans.). That the concluded negotiations with Binstock were in effect as originally offered. That Rude finally did not object to the original Binstock deal. He stated

that he would not stand in the way of the deal; that if Buchhalter wanted to go through with it, he should do so, and that he, Rude, would take whatever cash came in, and as to the balance he would give six months or a year.

Testimony of William F. Rogers:

Now for twelve years last past Vice President of The First National Bank of Denver. Is acquainted with both Messrs. Rude and Buchhalter. That The First National Bank is the escrow holder of the pulp mill assets in controversy. That no one other than the witness handled the matter for the bank (p. 122, trans.). Recalls occasion in November last when Messrs. Rude and Buchhalter called at the bank and drew down certain funds, and on that occasion Mr. Rude and Mr. Buchhalter came in and apparently were ready to close the transaction. "I simply drew up the receipt for them to sign and delivered to them the proceeds that I had. They both signed the receipt and I issued a Cashier's check jointly to both of them. They did not request it to be done that way. It was made jointly and accepted by them. I did not hear any portion of any conversation between the two respecting their respective or particular interests, in my presence. Mr. Rude did not tell me anything about his having a lien on the bonds in the bank. He has never made any demand upon me or the bank for the sale of the bonds to gratify his claim or lien. One of them, I do not recall which one, wanted to know if the bonds could remain there on escrow until they had arrived at a settlement, which I agreed to do. Both of them

were there at my desk when that was said. That is the extent of my connection with this matter."

(p. 123, trans.) On cross-examination, the witness states: "I did not know Mr. Rude and Mr. Buchhalter were going to call upon me when they did. That check, making joint payments to Mr. Rude and Mr. Buchhalter, was not done at Buchhalter's request. It is not a fact that the bank retained the difference between $16,000 plus and the $28,000 received, to recover an indebtedness which Mr. Buchhalter owed the bank. The payment was made by Mr. Buchhalter." The witness refers to some discussion relating to forty shares of Manufacturers' Trust Company stock which was purchased for Mr. Rude, which was duly delivered or forwarded to him.

Buchhalter's Testimony (pp. 129, trans., *et seq.*):

Respecting this defense testimony, we content ourselves by saying that it was diametrically opposed to that of the plaintiff in every material particular and was corroborated in practically every respect by the remaining defendants and the other defense witnesses.

Testimony of Harry S. Silverstein:

One of the defendants and a member of the firm of Blount, Silverstein and Rosner; has heard substantially all of the testimony in the case, and is familiar with the pleadings, and acquainted with Messrs. Rude and Buchhalter, and that his relationship to those parties, generally speaking, was that of attorney for some years past in connection with the Colorado Pulp and Paper mill controversies;

that some of this litigation is pending at the present time in the Colorado Supreme Court, and that there is at the present time a case so pending, involving the confirmation of the Master's sale of the pulp mill to Mr. Bronstine and Mr. Rude; that on the morning of August 29, 1929 (p. 151 *et seq.* trans.), about 9:30, Messrs. Rude and Buchhalter and Rosner entered his private office, all three reporting as to an interview they had had the night previous with Mr. Rosner and the discussion which then took place, Mr. Rude stating that he was not getting along well with Mr. Bronstine; that Mr. Rude had previously talked about some of the same matters, to the effect that he was fussing with Bronstine about where the insurance was to be placed, and concerning employees of the mill, complaining that Bronstine had excluded him from the management, etc., and that he, Rude, was tired of it, and was anxious to have Bronstine buy out his and Buchhalter's interests, and stated further, that the fear was entertained that due to such disagreements between Bronstine and Rude, a partition suit would be brought, and that they had discussed with Mr. Rosner the night before, the effect of a mortgage, whether it would put them in a more advantageous position in the event of a partition suit; that witness advised the parties that he thought it would make no difference, that he "saw nothing wrong with it," but advised against the proposed move; that there was very considerable discussion about it, and that the parties left and returned; that upon their second visit, Mr. Blount was invited into the conference and the proposition stated to him, and he likewise advised very strongly against the execution of any instruments of that kind; that

Rude and Buchhalter specifically stated that the proposed mortgage or trust deed was "with the idea of putting the title in Mr. Buchhalter's name because Mr. Rude had been unable to finally conclude negotiations for a sale, and he thought Mr. Buchhalter would be better able to do so, or anyway that it might conduce to that result"; that later this same afternoon, August 29th, 1929, Rude and Buchhalter returned and fresh grievances were stated against Bronstine, and Rude insisted that the title should be passed to Buchhalter, as he thought the latter would be better able to make a deal; that the discussion of the morning was as to Rude putting on the mortgage, but Rude subsequently stated that he could not do that, because being in business there would be an apparent indebtedness against him, and then suggested that Buchhalter should give the mortgage to him, Rude; that the parties remained in the witness' office all afternoon discussing the situation. The witness advised them the proposed move would be of no service, nor would it do Bronstine any harm; that the only possible advantage would be to give them a little more time to arrange their finances if they had to bid in at a partition sale. Witness further advised partition suit would be in equity, and the court would have the power to adjust all equities, and that the mere fact of a mortgage, whether for any consideration or not, would be adjusted, to which they both replied they wanted to go ahead anyhow, the mere question of time was sufficient; that various amounts were discussed and witness advised them it should be for some amount commensurate with the value of the property and not any excessive amount. Mr. Rude stated he thought

one-fourth interest was reasonably worth $75,000.00 on the basis of the entire mill being worth about $300,000.00, and that the consideration named was arrived at accordingly, the mortgage being given for $67,500.00. The witness reminded Mr. Rude that he was under contract with Mr. Bronstine and would have to carry it out, and advised Rude it would be advisable for him to write to Bronstine, notifying him to that effect, even though title were conveyed to Buchhalter; that otherwise Bronstine might be of opinion the deed was made merely to prevent a sale, and if Bronstine were of such opinion he might have a cause of action for damage and breach of contract. Witness also suggested to both Rude and Buchhalter that Rude should write a letter to Buchhalter stating that the note and mortgage were to be returned to him or cancelled "in the event he effected its purpose", that is, a deal was made or in the event of no partition suit. Rude stated that "he and Joe had had dealings for years and trusted each other implicitly, and that there was no need of doing that"; that witness then stated to Buchhalter "Well, you are taking a chance on that." Buchhalter replied, "I am perfectly willing, and Mr. Rude is the only man I would trust with an instrument of that kind." Mr. Rude stated "Mr. Buchhalter need not worry. The note will be cancelled and never used in any event." That the witness drew the note and trust deed in suit, and identifies Plaintiff's Exhibit D as being the instruments, and that there was no computation of Mr. Rude's interest, either principal or interest, in the presence of witness; that such was never mentioned; that witness' firm has garnishment proceedings against

the bonds in suit; that witness was never notified by Rude or any one in his behalf that Rude claimed a lien upon the bonds, or funds in the bank. Sometime subsequently, Mr. Rude, possibly in the presence of Mr. Rosenbaum, stated to the witness that he claimed a grievance against Buchhalter because the latter had not given him all of the cash received in the Binstock deal; that such was the only complaint against Buchhalter; that there was never any discussion about the issuance of this note and mortgage, and the transfer, other than on August 29th, 1929; that on this date, August 29th, witness mentioned to Rude that he should leave a signed release of the deed of trust, or signed request for release, and Rude said he would do that; that such a release was prepared later; that witness also asked Rude to leave the note in case the deal was put through, and Rude said he had sent the note to Dallas but would mail it back. Subsequently the note was sent to The Denver National Bank; that on November 18th, 1929, witness spent considerable portion of the day with Messrs. Rude and Buchhalter on the question of attorneys' fees. That the sum of $15,000.00 was agreed upon as the amount in full; that the next day Rude and Buchhalter came in and paid $5,000.00; that there was present Messrs. Rude, Buchhalter and Rosner, in addition to the witness. Rude drew a check to Buchhalter, that either witness or Mr. Rosner, or both, asked as to why it was being made out to Buchhalter. Rude said something about having his own reasons for it, whereupon the witness objected and required that the check should express on its face what it was for, and an endorsement was made on the check in Rude's presence,

while he was sitting there at the table across from the witness.

Contradictions of Mr. Rude by the Defense.

The foregoing testimony on behalf of the defense contradicts plaintiff's showing in its each and every salient phase. There is within its purview, no room in this case for any of his recitals. We will, however, descend to a few details.

Mr. Silverstein's testimony is not even attempted to be refuted or rebutted. The latter tells us definitely and flatly and absolutely that the note and trust deed set forth in suit and offered in evidence were simulated and pretended instruments between Buchhalter and Rude. He tells us that the whole transaction was a plan or a scheme, whereby, in their conception, they would be afforded some advantage as against Bronstine, and to such effect also is the testimony of all the other witnesses testifying on this subject, to-wit: Mr. Buchhalter, Mr. Rosner, Mr. Blount and Mr. Rosenbaum.

Mr. Silverstein further tells us that he was never at any time consulted on such a scheme or plan until August 29, 1929—neither before nor after. Mr. Rude swears the note and trust deed in question were at all times valid. On the final day of the hearing of this cause, he continued to make the same contentions, undertaking to deny Buchhalter's testimony as to the conditional delivery of the note or his promise to return or destroy it.

Mr. Rude swears that there was prior discussion (p. 73, trans.) about a deal along the same lines, which first discussion was with reference to a

so-called illegitimate deal (p. 74, trans.), but that the one in suit was actually genuine.

Mr. Rude swears that this so-called illegitimate deal was taken up with Mr. Rosenbaum prior to August 29, 1929 (p. 76, trans.). Mr. Rosenbaum swears it was on August 29th (p. 112, trans.).

Mr. Rude swears that Mr. Rosenbaum approved the deal in suit, the $67,500 note and trust deed (p. 76, trans.), and Mr. Rosenbaum swears (p. 109 *et seq.*, trans.) that he was never consulted but one time, and that was on August 29, 1929, and that the whole proposition laid before him by Mr. Buchhalter and Mr. Rude was a fictitious transaction, and that he disapproved and advised against it.

Mr. Rude swears (p. 76, trans.) that Mr. Rosenbaum was not asked to draw the papers. Mr. Rosenbaum swears that he was asked to do so and declined (p. 111, trans.).

Mr. Rude swears the only discussion with Messrs. Block and Buchhalter on the evening of November 18, 1929, was with relation to attorneys' fees (p. 81, trans.). Mr. Block swears (p. 117, trans.) that the whole computation was with respect to the parties' investment, and their then interests in the escrow.

Mr. Rude swears (p. 84, trans.) he told Mr. Silverstein that Mr. Buchhalter "wouldn't pay the note as we agreed in the bank." Mr. Silverstein swears that the only complaint Mr. Rude ever made to him against Mr. Buchhalter was to the effect that Mr. Buchhalter was to give him all the cash in the

Binstock transaction and had not done so (p. 155, trans.).

Mr. Rude swears (p. 74, trans.) that on August 29th, 1929, in Mr. Silverstein's office, and in his presence, it was agreed with Mr. Buchhalter that he, Rude, was to take "a note for the actual amount" of Rude's investment on August 29th, and that it was then figured up what was coming to him. Mr. Silverstein swears (p. 155, trans.) that no such computation ever took place, nor any other portion of such alleged agreement—that the whole proposed plan and scheme was fictitious as between the parties.

Mr. Rude swears (p. 75, trans) that when the $67,500.00 note was delivered to him by Mr. Buchhalter, that Mr. Buchhalter did not say that he, Rude, was the only man in the world to whom he would deliver such a note that was not real, but that Mr. Buchhalter said "he wouldn't deliver a note for $67,-500.00 on such short terms but to me. To the term being short my answer was that if the note came due he wouldn't worry. I wouldn't foreclose (p. 75, trans.). I would extend it," and that this was all said in Mr. Silverstein's presence. Respecting the foregoing Mr. Silverstein testifies (p. 155, trans.): "I suggested to both of them that Mr. Rude should write a letter to Mr. Buchhalter stating that the note and mortgage would be returned to him or cancelled in the event he effected its purpose, that is, a deal was made, or in the event of no partition suit, and Mr. Rude stated that he and Joe had had dealings for years and trusted each other implicitly, and there was no need of doing that. I said to Mr. Buchhalter 'Well, you are taking a chance

on that' and Mr. Buchhalter said 'I am perfectly willing and Mr. Rude is the only man I would trust with an instrument of that kind.' Mr. Rude stated at that time that he need not worry, in case a deal was made or no partition suit brought he would cancel the note, and it would never be used in any event."

Mr. Rude swears (p. 81, trans.) and in some half dozen other places in the record, that it was agreed at The First National Bank on November 18th, 1929, that he should be paid in full the next morning by sale of Mr. Buchhalter's private collateral, and some two and one-half months later (p. 93, trans.), that he was to have a lien for the balance of his note. All such alleged agreements stated to have taken place when Mr. Rogers' back was turned.

Mr. Rogers swears (p. 123, trans.), "Mr. Rude did not tell me anything about his having a lien on the bonds in the bank. He has never made any demand upon me or the bank for the sale of the bonds to gratify the lien. One of them, I don't recall which one, wanted to know if the bonds could remain there on escrow until *they had arrived at a settlement*, which I agreed to do. Both of them were at my desk when that was said."

Mr. Rude swears (p. 80, trans.) that Mr. Rogers was not asked whether the bonds could remain in the bank until himself and Mr. Buchhalter arrived at a settlement; that nothing like that was said; that Mr. Rogers said, "I am leaving $100.00 for escrow fee, which will be adjusted later. * * * He said he was taking the fee to be adjusted later."

Mr. Rude swears (p. 166, trans.) that he never mentioned to either Mr. Rosner or Mr. Buchhalter that he would give a mortgage to Mr. Buchhalter, because he had the property in his own name anyway. Mr. Silverstein swears (p. 153, trans.); "There had been a discussion in the morning as to Mr. Rude putting on the mortgage, and he stated he could not do that because, being in business, he had to make a statement, and it would not be good for his business to show an indebtedness, and suggested that Mr. Buchhalter should give him the mortgage." All of this in Mr. Buchhalter's presence, as well as that of Mr. Rosner.

(p. 178, trans.) Mr. Rude swears that he never stated to Mr. Buchhalter that he had any idea of putting on the mortgage on account of a partition suit. Mr. Rosenbaum swears (p. 110, trans.) that such was one of the reasons discussed with him by Mr. Buchhalter and Mr. Rude on the morning of August 29, 1929, and Mr. Silverstein (at page 152, trans.), swears to the same thing, and so does Mr. Blount (at page 105, trans.).

Mr. Rude swears that he did not call Mr. Rosner on the phone on the evening of August 28, 1929, when the matter of the fictitious note and trust deed was first discussed, and says (p. 166, trans.): "I don't remember ever seeing him there at all." Mr. Rosner is supported by Buchhalter (on p. 131, trans.) and by Mr. Silverstein (p. 152, trans.), testifying to Mr. Rude's admission to the conference of the night before with Mr. Buchhalter and Mr. Rosner.

Mr. Rude swears (p. 99, trans.) that he never spoke to Buchhalter after the alleged $5,000 loan on November 19, 1921. Mr. Block testifies that Rude was present with Buchhalter at the discussion regarding his commission, which we have seen to be November 22, 1929.

But why pursue contradictions further? This presentation has already transcended all limits originally intended.

We briefly call this Honorable Court's attention to the various attempts made by Mr. Rude's counsel to shut out all testimony respecting the execution of the note for $67,500, and cannot refrain from the observation that notwithstanding the bill of complaint, why, if that note and trust deed are not in this case, such frantic efforts were put forth to keep the facts from the court's knowledge or consideration? We refer to p. 95, trans. (Rosner's testimony), for the first objection:

> "Mr. Morris: * * * We object to the evidence that is sought to be elicited, for the second reason that it is sought here to adduce evidence in contradiction to the terms of a written instrument, namely, the note that has been mentioned, which cannot be varied or altered by parol."

P. 96, trans. (Rosner's testimony.) The same objection, with the request to be heard.

P. 98, trans. The same objection.

P. 99, trans. The same objection and protracted argument.

P. 105, trans. (Blount's testimony.) The same objection.

P. 111, trans. (Rosenbaum's testimony.) The same objection.

P. 156, trans. Testimony of Mr. Silverstein respecting the note and trust deed. Moves that testimony be stricken out because it tends to vary the force and effect of written instruments.

We have not noted them all, but there are perhaps a dozen objections to the evidence seeking to establish the invalidity of the note and trust deed in question, and approximately as many arguments, only to find, at the close of the case (p. 187, trans.), that the "note is abandoned" by Rude's counsel as the basis of liability of Buchhalter to Rude. And now it is asserted that the "suit was not upon the note". To adhere to that statement is the equivalent of admitting that there was no suit at all! We note further that there was no attempt to rebut or refute the testimony of Mr. Silverstein, Mr. Rosner, Mr. Blount and Mr. Rosenbaum in that regard, although a series of denials on the part of Rude was put forth on his last occasion on the witness stand (p. 175 *et seq.*, trans.), respecting the testimony of Buchhalter. All this is a remarkable shift of position when one remembers the allegations of the bill, and further, that Mr. Rude's sole testimony respecting Buchhalter's alleged liability to him was on that hypothesis, that is, the hypothesis of the absolute and unimpeachable integrity of the note.

Of course, Messrs. Blount, Silverstein and Rosner, having been made defendants because they were

charged with full knowledge of the truth of all the allegations of the bill, were, in their own defense, entitled to show the invalidity of an instrument to which they were not parties, when the same was set up in an attempt to defeat their rights. And in addition to all this, as elsewhere pointed out, Rude's own testimony defeated his suit.

Such, may it please the Court, is the record in this cause on which Rude asked the Court of Appeals to declare him a proportionate owner of the escrow and to distribute the proceeds accordingly.

It is again respectfully submitted that Rude is destitute of right to raise any question presented by his petition.

The Unclean Hands Maxim.

But we pass to a consideration of the defense interposed to Rude's entire suit, namely, that he was not in court with clean hands. Elaborate or detailed discussion cannot be necessary. The record bristles with the petitioner's bad faith. We confidently characterize the litigation as a fictitious suit on a fictitious instrument and deliberately intended to have been such and undertaken to be supported by testimony false in its practical entirety.

This Honorable Court is of course fully aware of the doctrine and all its implications and it is with a feeling of apology that we offer cases on the subject. However, for convenience, references to a few adjudications will be made. No case approaching a parallel in facts has come to our attention, but since the doctrine is suited to and fits every sort of

reprehensible conduct, one expression of the rule is about as pertinent as another. We respectfully refer, first, to the case of

Weegham v. Killefer, 215 Fed. 168, 171; affirmed C. C. A. 6:

> "The principle embodied in the maxim, 'He who comes into equity must come with clean hands,' is a cardinal one lying at the foundation of equity jurisprudence. Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly 'within the law.' Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both court and text writers have repeatedly spoken upon this subject in no uncertain lauguage.
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> "In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284-287, the Circuit Court of Appeals of the Eighth Circuit, speaking by Judge Sanborn, said:

"'A suit in equity is an appeal for relief to the moral sense of the chancelor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty and reasonable diligence will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit.'

"In Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. E. 757, Mr. Justice Brewer, speaking for the court, said:

"'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may

make of them in a court of law, he will be held remediless in a court of equity.'

"In Larcheid v. Hashek Mfg. Co., 142 Wis. 172, 175, 125 N. W. 442, 443 (20 Ann. Cas. 576), the Supreme Court of Wisconsin said:

" 'The exclusion of a plaintiff from the peculiar favors of courts of equity results equally where his conduct has been unconscionable by reason of a *bad motive,* or where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others.'

"Mr. Pomeroy, in his work on Equity Jurisprudence, Sections 398, 400 and 404, says:

" 'Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle established from the earliest days, that while a court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of law, or even in contradiction to these rules, while it could act upon the conscience of the defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court

of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness, on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.

" 'A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but, if the plaintiff's conduct in obtaining it, or acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages.

" 'It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; *any really unconscientious conduct*, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience'." (Italics ours.)

"Mr. Eaton, in his work on Equity, at page 74, says:

" 'The maxim applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf. A court of equity will not decree the specific performance of a contract

> unless it is strictly equitable, and free from trickery and deception on the part of the party seeking such performance. Even if the inequity of the plaintiff is insufficient to warrant the court in cancelling the contract, yet the plaintiff may be refused its enforcement. And equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of unconscionable conduct which does not amount to legal fraud'."
>
> "Authorities to the same effect might be multiplied indefinitely. The foregoing will suffice to state and to define the universally accepted and adopted rule upon this subject. The principle thus broadly enunciated is not confined in its application to controversies of any particular nature or class, but extends generally to all cases cognizable by courts of equity."

Another expression of the rule is found in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, p. 227:

> "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must themselves be free from the imputation."

And the rule has found constant recognition by this court.

In the case of *International News Service v. Associated Press*, 248 U. S. 215, 245, while it was held the facts there involved were not sufficient to invoke

the doctrine, that none the less, if a complainant's attitude is unconscientious or inequitable towards his adversary so as to fix upon him the taint of unclean hands, he is debarred from relief.

And perhaps the last expression this court has had occasion to make on this subject is found in *National Fire Insurance Co. v. Thompson*, 281 U. S. 331-338. It is there said (p. 338):

> "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect to the matter concerning which it seeks relief."

In the case of *Primeau v. Granfield*, 193 Fed. 911 (C. C. A. 2), the Court of Appeals, of its own motion and in the absence of the question having been raised either by counsel or the court below, took notice of the unclean nature of the complainant's controversy and rejected its adjudication *sua sponte* on the broad ground of public policy.

Now how does the doctrine apply to the case of this man Rude? In the first instance, he has told us (p. 74, trans.) that the negotiations for sale to his associate Bronstine, in the mill purchase, having been unsuccessful, the scheme was hit upon "to make Bronstine buy;" that such was one of the purposes of the $67,500.00 mortgage in question. It is a fair construction of the record that he induced Buchhalter to execute the $67,500.00 note and mortgage in order to practice that oppression on his partner and associate, Bronstine.

Subsequently, and in the month of September,

1929, a dispute arose between Rude and Buchhalter over the "cash" in the deal. This dispute, however, did not become acrimonious until November, 1929, when Rude arrived in Denver for the purpose of receiving his share of the proceeds.

In time his animosity knew no limits. In December, 1929, he addressed a letter to the wife of the respondent Buchhalter, making the sinister threat of adverse publicity for the whole family if a "satisfactory settlement" with him were not made. He tells Mrs. Buchhalter that they will be "dragged through the mire" (p. 227, trans.).

At the trial, and in the obvious attempt to effectuate that threat through the medium of so-called character witnesses, he attempts to besmirch Buchhalter, who he had previously testified was his bosom friend of many years standing and in whom he had implicit confidence. One of these so-called character witnesses, one Levy (p. 172, trans.), admitted his unfriendliness to Buchhalter; another, one Hershey (p. 169, trans.), was a politician, whose reason for testifying was obviously untrue, and who really knew nothing about it; another, one Van Schaack (p. 170, trans.), who admitted his testimony was due to the request of one F. G. Bonfils, publisher of the Denver Post, and against whom defendant Buchhalter had pending a suit for libel (p. 79, trans.), and one Tracy (p. 161, trans.), who founded his opinion of Buchhalter's reputation on the naked fact that a corporation with which Buchhalter had been connected was slow in paying some of its bills.

Further, Rude came into court swearing to an

alleged further indebtedness of $5,000.00 on Buchhalter's part to him, which was not only transparently false, but was also refuted by all of the principal defendants in the case.

Rude went into court admitting his boast to "break" Buchhalter (p. 79, trans.). He went into court boasting that Buchhalter had "met his match" at this time (p. 79, trans.). And all this, as just noted, against a man who had been his devoted friend (p. 73, trans.) of long standing.

But, worst of all, and, we submit, beyond the right of any court of equity to condone, this man Rude went into court, using as the basis of his pretended cause of action a promissory note in the sum of $67,500.00 that his own testimony disclosed had no place in his case, and concerning which, the other defendants, whose rights he also sought to destroy through the medium of that note, more than overwhelmed him on his assertions as to its validity. And the defendant Rosner (p. 101, trans.) testified that prior to the institution of his suit, Rude admitted that he knew the note in question possessed no validity, but that he was going to employ it against Buchhalter notwithstanding; that he was going to "get" Buchhalter, no matter what the cost.

It would seem that if up to now there existed no such doctrine as unclean hands, it would, under the noisome facts of this case, be necessary to invent and apply it.

Judge McDermott, in his opinion on that phase of the matter, was in undoubted error. He confused,

if we may respectfully so say, the doctrine of "forfeiture" with the unclean hands principle. The two are not even remotely related. If they were, the one would have always destroyed the other and the unclean hands doctrine would not exist. And Judge McDermott seemed to think also that to apply the doctrine would be taking property from one pair of unclean hands and giving it to another. Again he was plainly in error. It is true that Buchhalter's execution of the $67,500.00 note in question was far from commendable, nor certainly is it commended. We think, none the less, that the record shows that he was the dupe of his then great friend Rude, whom he implicitly trusted and whose adroitness and perspicacity in accumlation he admired. His confidence in this man Rude was such that he declined to exact from him at the time of the delivery of the note (as advised by Mr. Silverstein) a letter reciting that it was never to represent an obligation.

But aside from such matters, Buchhalter did not go into court. His answer and his testimony were frank, fair and honest. The doctrine has no application to such a defendant. It operates only to debar from relief the unclean complainant.

We have seen again and again that Rude, in his attempt to get a large personal judgment and "lien" and thus to absorb and appropriate unto himself the entire escrow proceeds, on his oath disclaimed all interest by way of ownership therein, save by way of "lien."

Accordingly, it is again respectfully urged, if the Honorable Court of Appeals erred at all, it was

in undertaking to adjudicate Rude's rights and to have awarded him anything whatsoever, other than to give him leave to sue at law, as he might be advised. The escrow should have been dissolved so far as Rude is concerned. The mere fact that it was in the hands of a third person could not serve to enlarge the rights of the unclean litigant. Such would nullify the doctrine. Had the proceeds all been in Buchhalter's hands, the doctrine would operate to leave them there, so far as equity is concerned. We again submit that Rude exhausted his equitable rights and remedies by his unconscionable conduct. This result imperatively ensues from sheer principle.

Such is the result if the unclean hands doctrine is to find application. And if it be not applied, then litigants may institute at will in the courts of equity of the United States all the "groundless" and "unconscionable" claims they may please, supported by false testimony, and failing, through litigious hazard or the ability of defendants to successfully defend, they will nevertheless find themselves invested with their actual interests on the strength of defensive allegation and proof. There is, if your Honors please, no such doctrine as that, unless the case at bar establish it.

CONCLUSION.

If the Court of Appeals was right in assuming to award Rude an interest in the escrow, notwithstanding it also found his claims, as asserted, to have been groundless, his conduct unconscionable and his testimony materially false, then, it is submitted that the maxim, "He who seeks equity must do equity," constitutes its full authorization to award respond-

ents reimbursement for their outlay, out of the funds in escrow in litigation, and hence in the custody of the court. We have seen, in Section I of this brief, the many and varying instances under special facts, in which a like procedure has been followed. A contrary holding would accord the fee bill statute the effect of being a limitation upon the exercise of what has long been regarded as the inherent powers of a court of equity. To now strip the courts of the power so long exercised would, we submit, as previously stated, be little short of revolutionary. The fee bill statute either applies to every instance of attorney's fee allowance in the Federal equity courts, or it applies to none. Neither reason nor logic occurs to us, at least, to justify or support a distinction. If exceptions are to be made, they must rest on something other than an arbitrary or anomalous foundation. If the first construction of the statute—the Greenough case, *supra*—holding that it did not apply to instances of the recovery or preservation of trust funds was error, it is now too late to alter it, in view of the long line of cases that have followed in its wake. If that construction was correct, sound reason cannot now be assigned for permitting the statute to operate as an invasion of what so long has been regarded as within the inherent powers of equity courts in other instances.

If, therefore, as stated, this Honorable Court shall conclude the Court of Appeals was correct in assuming to adjudicate Rude's rights, its holding should be in all things affirmed.

However, if this Honorable Court shall conclude

that the cause, instead, is one for the operation and the application of the unclean hands doctrine, the question of an attorney's fee allowance becomes moot in this case. On our part, and on this latter phase of the case, it is submitted that the escrow should be dissolved in Buchhalter's favor, subject to the rights, if any, of the other respondents, and Rude be remitted to his action at law. Otherwise, no matter how false one's testimony, howsoever corrupt his motives, howsoever fictitious his suit, howsoever groundless his claims, howsoever unconscionable his conduct, howsoever great his trifling with the courts, he will still be awarded his rights of adjudication. This is in conflict with all principles of equity. Such a doctrine is too dangerous to exchange for the unclean hands maxim. It throws down the bars to perjury and to fraud. It casts upon courts and defendants a dangerous burden that they might not in every case be able to discharge, and hence might make in many instances, courts of conscience the unwitting or the helpless instrument of corruption. The instant case is an example. The litigious spirit of the petitioner Rude is exhibited by his very application to this Court. Notwithstanding the astonishing record in this cause and the findings of the Court of Appeals thereon (solemnly arrived at by twice reading the record), Rude still insists that, willy-nilly, he must be invested, free from condition, with that which he falsely swore he did not own. And in view none the less, of his shocking attempt to destroy an adversary, he was given relief not to be found within his pleadings, his testimony or his prayer. He cannot complaint of that, especially when he urged the

Court of Appeals to award it to him. He complains because he was taxed with his adversaries' outlay, corruptly occasioned by himself.

With great respect, we insistently urge that the results of his own invocation, to-wit, the unclean hands doctrine, be now applied to him, and that an end be forever put to this controversy so far as the escrow in suit is concerned.

HENRY E. LUTZ,
Counsel for Respondents Buchhalter, Blount, Silverstein and Rosner.

SUPREME COURT OF THE UNITED STATES.

No. 736.—October Term, 1931.

I. Rude, Petitioner, *vs.* Joseph Buchhalter.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 23, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the federal court for Colorado by petitioner against respondent, the First National Bank of Denver, and the members of a law firm to obtain judgment against respondent on an oral promise to pay a large sum and to establish and foreclose a lien therefor upon certain bonds and cash held by the bank in escrow. The principal controversy was between petitioner and respondent. The bank claimed a lien on the fund to secure payment of a small sum owing to it by respondent. The lawyers asserted a claim under an attachment to enforce payment of an amount to be fixed as their compensation for services in a proceeding in the state court. After trial at which much evidence was heard the court dismissed the complaint on the merits. Respondent appealed and petitioner took a cross appeal. On respondent's appeal the Circuit Court of Appeals remanded with instructions for further proceedings in the district court and on petitioner's appeal affirmed. 54 F. (2d) 834.

This writ brings here for review the part of the decree directing the district court to deduct from petitioner's share of the fund in escrow the expenses, including reasonable attorneys' fees to be fixed by the district court, to which respondent and the bank have been put in this litigation.

The evidence and findings disclose facts, occurring before those alleged in petitioner's complaint, that shed light upon the question presented. In June, 1929, at a state court receiver's sale he and one Bronstine each bought an undivided half of the property of the Colorado Pulp and Paper Company. The purchase price was

paid in cash and in bonds of that company. Under an agreement between petitioner and respondent the former furnished $61,000 and the latter $53,922 making the total required to pay for the half interest bought by petitioner. It was transferred to petitioner and later a quarter interest was conveyed by him to respondent. Possession of the property was given to Bronstine who carried on the business for account of all concerned. Petitioner and respondent wanted to sell their interest and, in order to force Bronstine to buy them out, they pursued a course of hostile and threatening criticism of his management. And when a partition suit by Bronstine seemed imminent they, conspiring to embarrass and delay him should he seek relief by that means, falsely made it to appear of record that a quarter interest in the property was subject to a heavy incumbrance. For that purpose they caused to be made and recorded a deed transferring petitioner's quarter interest to respondent and also a trust deed to the public trustee purporting to secure a note made by respondent to petitioner for $67,500. Respondent soon succeeded in selling the half interest to one Binstock, an associate of Bronstine, for $28,080 in cash and $92,500 in bonds of the Colorado Paper Products Company. Petitioner, as a condition of clearing the title of record, required that all the cash and bonds should be delivered to the bank to be held in escrow until he and respondent should agree in writing as to the disposition of the same. They promptly divided nearly all of the cash, but came to no agreement for division of the remaining money or the bonds.

Later, petitioner brought this suit claiming that the fictitious note and trust deed were valid and alleging that, when the cash was divided, respondent promised to pay him the full amount of the note and $7,500 out of the profits of the venture and that the bonds should be held in escrow until the balance alleged to be owing, $59,699.61, should be paid. And the complaint alleges that the lawyers had attached the interest of petitioner and respondent and claimed a prior lien on the fund. The prayer is that petitioner have judgment against respondent for the amount claimed; that the same be declared a lien upon the fund, and that the bank sell the bonds and apply the fund to the payment of the judgment. Respondent's answer alleges that the note and trust deed were fictitious, denies the alleged promise, avers that he and petitioner had

approximately equal interest in the property and that the only agreement between them was that the sale of their half interest be joint and entire and the proceeds be equally divided between them, and prays that the complaint be dismissed on the merits. The lawyers' answer asserts that they have a lien upon the fund, denies that petitioner has any, and prays that he be denied relief. The bank's answer shows that the cash and bonds were deposited with it to be held in escrow until petitioner and respondent agree in writing as to the disposition of the same, sets forth the division of the cash, alleges that respondent assigned his interest in the fund to the bank as security for the payment of $1,250 and prays that it be declared to have a first lien on the fund, be instructed as to disposition of the balance and have costs and attorneys' fees incurred in this suit.

After hearing the evidence and before making findings under Equity Rule 70½, the district court filed a memorandum showing that petitioner had failed to make out his case. Then respondent submitted requests for findings of fact and, in addition to those negativing petitioner's cause of action, asked the court to find that petitioner and he entered into a campaign against Bronstine, including the making of the fictitious note and trust deed, to create difficulties and to force Bronstine to buy their interest in the property; that, by making the note the basis of his suit, petitioner attempted to perpetrate a fraud against respondent and to impose upon the court; and that petitioner's testimony is unworthy of belief. And respondent proposed as conclusions of law that petitioner by reason of the campaign against Bronstine did not come into court with clean hands, and that the bank should be directed to deliver the entire fund to respondent subject to its lien and the claim of the lawyers. The court, refusing to adopt any such condemnatory requests, made findings merely showing the respective amounts invested in the property by petitioner and respondent; that the fictitious note had been canceled; that pursuant to agreement the proceeds of the sale were to be held by the bank in escrow until respondent and petitioner agreed in writing as to the disposition of the same; that cash had been divided and that the escrow agreement had not been modified. As its conclusion of law the court declared that the complaint should be dismissed on the merits as to all

defendants with costs to be taxed against petitioner, and entered its decree accordingly.

On his appeal respondent prayed not for reversal of any part of the decree but that it be made to declare that as against petitioner he was the owner of the fund and to direct the bank to deliver it to him. The opinion of the court clearly shows that claim to be devoid of merit. Petitioner on his cross appeal merely prayed for the relief sought in his complaint. The decree was affirmed and that ruling is not questioned here. In his brief in that court, petitioner suggested that if it held his suit was rightly dismissed below, it should direct distribution under the agreement.

First to be considered is the command of the Circuit Court of Appeals that the district court deduct from petitioner's share the "court costs and expenses to which Buchhalter" has "been put in this litigation including reasonable attorneys' fees to be determined by the trial court".

This is not a taxation of costs as between solicitor and client. Cf. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 28 F. (2d) 233; 281 U. S. 1. The only costs allowed to be included in the money judgment against petitioner are those taxable as between party and party; counsel fees or other expenses not so taxable are not to be included. The Circuit Court of Appeals found that, by reason of petitioner's wrongful and fraudulent demands and bad faith in bringing and maintaining this suit, he prevented the distribution of the fund according to the escrow agreement and put respondent and the bank to the expense of making their defense against a groundless claim. It concluded that, because of such inequitable conduct, the decree should impose upon petitioner's share a lien in favor of respondent and the bank for the expenses to which they were so put.

It is significant that the trial court, though specifically requested by respondent so to do, declined to find that petitioner in bringing this suit attempted to perpetrate a fraud against respondent or to impose upon the court or that he came with unclean hands or must have known that the cause of action he alleged was without foundation in fact. Such refusal strongly suggests that the trial court who saw and heard these antagonists upon the witness stand was of opinion that no such condemnation was warranted by the evidence. Its findings appear to have been diligently restrained

to those merely sufficient to show that petitioner failed to sustain the essential allegations of his complaint. Indeed one of respondent's requests for findings reflects unwillingness on the part of petitioner to accept other than cash for his share and that there were reasons, other than matters of mere accounting, for the agreement that the cash and bonds should be held in escrow until petitioner and respondent "have agreed in writing concerning the disposition of the proceeds".

The Circuit Court of Appeals went beyond the issues presented by the record. Its opinion shows that determination of the appeals did not require findings as to the good faith of petitioner. Respondent, claiming the entire fund, necessarily opposed distribution under the agreement. A large part of the work of his attorneys is chargeable to the attempt to enforce his groundless claim to the entire fund. He made no application for a lien upon petitioner's share on account of expenses or attorneys' fees. Such allowances are not made as of course. And petitioner had no reason to apprehend that any such matter would be considered on either appeal. He had no opportunity to be heard in respect of the authority of the court to make such an allowance or as to the facts touching the propriety or basis of the same. Petition for rehearing and denial, as here, upon a reasoned opinion may not in such a matter fairly be regarded as the equivalent of a hearing in advance of decision.

The opinion below condemns the conduct of both parties in various details of the transaction out of which this litigation arose. The record discloses that when acting together in the pursuit of gain they were not governed by proper standards and that where their interests came in conflict they disregarded considerations making for fair play. Nice distinctions as to which disclosed the greater lack of good faith are not sufficient to warrant a court of equity in putting upon one any part of the expenses incurred by the other in waging such a contest. Assuming that the matter was properly before the court for consideration, we are of opinion that the record does not warrant any such allowance in favor of respondent.

The bank is not entitled as against petitioner to any allowance on account of expenses or counsel fees incurred to protect its claim against the fund to secure the debt owing by respondent

to it. But under settled principles applied in equity courts its reasonable expenses including a fair amount to pay the fees of its attorneys incurred in this suit and which are attributable to the discharge of its duty under the escrow agreement properly may be made a first charge against the fund as a whole. *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 744. The decree will be modified in accordance with this opinion, and the costs in this Court will be taxed against respondent.

Modified, and as modified affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.